No. 88-1497

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and, USAIRLINES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Where a municipality takes an interest in real property and the owner sues directly under the Fifth Amendment for just compensation, does *Wilson v. Garcia*, 471 U.S. 261 (1985), compel application of the state's personal injury statute of limitations when state law under the identical state constitutional just compensation provision would apply the limitations period for adverse possession?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff in the District Court and appellant in No. 88-2399 was Lawrence C. Bieneman, on his own behalf and on behalf of all persons similarly situated.

Defendants in the District Court and appellees in No. 88-2399 were: The City of Chicago; Eugene Sawyer, in his official capacity as Acting Mayor of the City of Chicago; Howard Stanback, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; American Airlines, Inc.; Delta Airlines, Inc.; Northwest Airlines, Inc.; Ozark Airlines, Inc.; Trans World Airlines, Inc.; United Airlines, Inc.; and, USAirlines, Inc.

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LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,
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THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and, USAIRLINES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above entitled cause No. 88-2399.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in No. 88-2399 was rendered on December 13, 1988. It is reprinted at page A-4 of the Appendix.[1]

JURISDICTION

The judgment of the Court of Appeals in No. 88-2399 was entered on December 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The District Court had jurisdiction over the case pursuant to 28 U.S.C. Section 1331.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are:

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

2. The Just Compensation Clause of the Illinois Constitution: "Private Property shall not be taken or damaged without just compensation as provided by law." Ill. Const. art. I sec. 15.

3. The Illinois statute of limitations governing actions to recover compensation for "takings" of interests in real estate: "No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within 20 years after the right to bring such action or make such

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[1] Hereafter, page citations to the Appendix will be referred to as "A-___".

entry first accrued. . . ." Ill. Rev. Stat. ch. 110, Sec. 13-101.

4. The Illinois statute of limitations for personal injury actions: "Actions for damages for an injury to the person. . . shall be commenced within 2 years next after the cause of action accrued. . . ." Ill. Rev. Stat. ch. 110, Sec. 13-202.

STATEMENT OF THE CASE

This case involves the statute of limitations to be applied when a political subdivision of a state takes an interest in real estate and the property owner sues in inverse condemnation directly under the Fifth Amendment to the United States Constitution seeking just compensation for the taking.[2] In identical actions for recovery of just compensation for a taking of real estate under the Illinois Constitution, Illinois courts have ruled that the period of limitations to be applied is the statutory period provided by the state adverse possession statute – 20 years. Disregarding Illinois law, the Court of Appeals held that this Court's decisions in *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), compelled the application of the state limitations period for personal injury actions – two years.

A. The Facts

Petitioner Lawrence C. Bieneman (Bieneman) owns and resides on real property near O'Hare Airport. The

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[2] The action for recovery of just compensation for the taking of an interest in Petitioner's real estate was not brought pursuant to the Civil Rights Statute of 1871, 42 U.S.C. Section 1983. The action was brought directly pursuant to the cause of action for just compensation created by the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, ___U.S. ___, 107 S.Ct. 2378, 2386 n. 9 (1987).

noise from over 700,000 annual aircraft operations at O'Hare is so overwhelming that Bieneman and other area residents cannot get a decent night's sleep; their children cannot study; and they cannot use their yards or even their living rooms to relax and enjoy their property. The noise problem is compounded by the pervasive stench of aircraft fuel aerosols, a known cancer hazard, which fill the air and rain a potentially deadly toxic mist on homes, yards and schools.

B. The Proceedings Below

In December 1984, Petitioner Bieneman, on his own behalf and on behalf of all persons similarly situated near O'Hare, brought this action for compensation for the "taking" of his property as a result of the intense levels of noise, vibration and air pollution from O'Hare operations. (See Amended Complaint, Count III, A-68). This Court, in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), held that where an airport proprietor allows overflights over residential property which severely disturb sleep, communication, and the use and enjoyment of the property, an avigation easement has been taken which requires the payment of just compensation.

In addition to compensation for a taking within the *Griggs* doctrine, Bieneman sought to recover damages for *personal* injuries caused by airport noise. Though Illinois law provides state law damage remedies for personal injury resulting from excessive noise, vibration and air pollution – as well as a *state* constitutional guarantee prohibiting a taking of property without just compensation – a quirk in Seventh Circuit precedent barred Bieneman from any state law remedies. In contrast to the weight of authority holding that there was no federal preemption of state law damage remedies for injuries caused by noise from airport operations,[3] a solitary 1975 decision by the Seventh

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[3] *Greater Westchester Homeowners Association v. City of Los*

(Footnote continued on the following page)

Circuit held that Congress has preempted state law damage remedies for injuries caused by aircraft operations. *Luedtke v. County of Milwaukee*, 521 F. 2d 387 (7th Cir. 1975). As the law of the Seventh Circuit, *Luedtke* purported to declare a federal constitutional bar to all state remedies.

1. Plaintiff's Initial Complaint

Faced with *Luedtke's* purported federal constitutional bar on all *state* damage remedies, Bieneman initially sought relief under federal law for his personal injuries as well as compensation for the taking of an easement in his property under *Griggs*.

- Count I of the original Complaint alleged with specificity that it has been and continues to be the official policy and practice of the City of Chicago – duly authorized and implemented by City officials and carried out under color of state law – to operate, develop and expand O'Hare International Airport in a manner that intentionally injures Bieneman and his property, and thereby deprives him of his constitutional rights to life, liberty and property in violation of his right to substantive due process. (A-54)[4]
- Count II alleged with specificity that the Airline Defendants have carried out the City's policy

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3 *(Continued)*
Angeles, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980); *Owen v. City of Atlanta*, 157 Ga.App. 354, 277 S.E.2d 338 (1981), *aff'd, City of Atlanta v. Owen*, 248 Ga. 299, 282 S.E.2d 906, *cert. denied*, 456 U.S. 972 (1982); *Krueger v. Mitchell*, 112 Wis.2d 88, 332 N.W.2d 733 (1983); *Ursin v. New Orleans Aviation Board*, 506 So.2d 947 (La.Ct.App., 1987), *rev'd on other grounds*, 515 So.2d 1087 (La. 1987).

[4] Counts I and II of the First Amended Complaint (A-54) are identical to Counts I and II of the original Complaint.

in active concert and participation with the City Defendants, and that the Airline Defendants have conspired with the City Defendants under color of state law to *intentionally* injure Bieneman and damage his property, and thereby deprive him of his constitutional rights to life, liberty and property. In both Counts I and II, Bieneman sought to recover damages for personal injury and damage to his real and personal property.

Count III was an inverse condemnation claim against the City to recover compensation for the taking of Bieneman's real property. This count alleged that the City, as owner, operator and proprietor of O'Hare, has caused and continues to cause numerous jet-powered aircraft to be operated at all hours through the airspace over or adjacent to Bieneman's property. Bieneman further alleged that these continuous aircraft operations have impacted and continue to impact Bieneman and his property with excessive levels of noise, vibration and air pollution; and as a result, Bieneman's property and airspace had been taken.

The City and Airline Defendants moved to dismiss Counts I and II for failure to state a claim. The District Court granted this portion of their motion, finding that notwithstanding his injuries, Bieneman had not identified a liberty or property interest under the Due Process Clause of the Fourteenth Amendment that had been violated by Defendants (A-87).

The City also sought dismissal of Count III, the inverse condemnation claim, for failure to join the United States as a necessary and indispensable party or, in the alternative, requested a more definite statement. The District Court denied the motion to dismiss, agreeing with Bieneman that

the City was the owner and proprietor of O'Hare and that under *Griggs*, Petitioner stated in Count III a claim upon which relief could be granted (A-87). However, the District Court did require Bieneman to allege more definitely in his Complaint the time he took title to the property and the approximate date of the taking (A-87).

Bieneman moved for reconsideration of the dismissal of Counts I and II, and the requirement of a more definite statement. That motion was denied on March 20, 1986 (A-84).

2. The First Amended Complaint

Thereafter, Bieneman filed his First Amended Complaint (A-54). Counts I and II, based on a denial of substantive due process, were re-stated to preserve the right to appeal their dismissal. The Count III inverse condemnation claim was amended in compliance with the District Court's order to include the date Plaintiff Bieneman took title to his property, 1967, and the approximate date of the taking, 1976. (First Amended Complaint, Count III, pars. 4 and 22; A-68). In addition, a number of pendent counts based on state law were added by Bieneman.

The City and Airline Defendants moved to dismiss all counts of Bieneman's Amended Complaint. The District Court granted Defendants' motions, and entered final judgment, effective June 8, 1987 (A-43; A-44; A-45).

The District Court held that all of Bieneman's state tort law claims were preempted by federal law (A-45). In so ruling, the District Court relied exclusively on the Seventh Circuit's decision in *Luedtke v. County of Milwaukee*, 521 F. 2d 387 (7th Cir. 1975).

The District Court further held that Bieneman failed to state a claim against the City for inverse condemnation, ruling that such a claim could not be based on the Fifth and Fourteenth Amendments, as alleged by Bieneman, but only on 42 U.S.C. sec. 1983. The Court went on to hold that

even if Bieneman's taking claim was amended to allege a violation of Section 1983, Bieneman's claim – which arose in 1976 and was filed in 1984 – would be barred by a five-year statute of limitations applicable to such a Section 1983 action.

3. Proceedings In The Court Of Appeals

Following the decision of the District Court dismissing the Complaint on the merits for failure to state a claim, Bieneman filed a timely notice of appeal. The Court of Appeals dismissed the appeal for lack of jurisdiction, holding that the failure of the District Court to rule on class certification rendered the decision not final. (A-37).

On remand, the District Court denied certification of any aspect of this case as a class action, and based on the prior ruling on the merits, entered final judgment against Bieneman. (A-23; A24; A-25).

On appeal, the Court of Appeals ruled as follows:

1. As to the deprivation of a liberty or property interest, the Court held that in order for there to be a violation of substantive due process, the injury must have been the intended goal of the government activity. (A-9 to A-10).

2. As to the taking claim, the Court of Appeals held that – despite the fact that Illinois would apply a 20-year statute of limitations to inverse condemnation actions for the taking of real estate – *Wilson v. Garcia*, 471 U.S. 261 (1985) and *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617 (1989), mandated application of the state's personal injury statute. (A-11 to A-15).

3. As to the state law claims, the Court of Appeals held that its 1975 decision in *Luedtke* was incorrect and that state law damage remedies were not preempted by federal law. The Court of Appeals overruled *Luedtke*. (A-17).

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is In Direct Conflict With The Law Applied By Illinois Courts On Identical Taking Claims

The instant Petition is directed solely at the Court of Appeals' ruling that this Court's decisions in *Wilson* and *Goodman* compel the application of a two-year personal injury statute of limitations to a direct constitutional action for just compensation for Chicago's taking of an easement in Bieneman's real property.

Bieneman's action was not brought pursuant to the Civil Rights Statute of 1871, 42 U.S.C. Section 1983. The action was brought directly pursuant to the cause of action for just compensation created by the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 2386 n. 9 (1987). Thus, the legislative intent to be examined here is not that which was examined in *Wilson* and *Goodman*, *i.e.*, the intent of the 42nd Congress in passing the Civil Rights Act of 1871. The construction of that Act is not at issue here.

Nor is this a situation where the federal remedy – a direct action for just compensation for the taking of real property – is a unique federal remedy with "no precise counterpart in state law". *Wilson v. Garcia*, 471 U.S. at 271. In identical actions for recovery of just compensation for a taking of real estate under the Illinois Constitution, the Illinois courts have ruled that the applicable period of limitations is the statutory period provided by the state adverse possession statute – 20 years.

In extending *Wilson* and *Goodman* well beyond the boundaries of the 1871 Civil Rights Act, the Court of Appeals has trivialized the Just Compensation Clause of the Fifth Amendment. How can logic reconcile the fact that an inverse condemnation action for the "taking" of real estate under the Just Compensation Clause of the

Illinois constitution is governed by a 20-year limitations period, while the identical action under the federal constitution is limited to two years under the state personal injury statute? There is nothing in either *Wilson* or *Goodman* that compels such an anomalous result.

B. The Limitations Period Applied To Taking Claims Under Illinois Law

This Court has declared that the proprietor of an airport, such as the City of Chicago, has a constitutional obligation to pay neighboring property owners for substantial interference with the use and enjoyment of their property arising from the noise of aircraft operations. This Court has characterized this interference as the taking of an easement in real estate:

> We think, however, that respondent, which was the *promoter, owner and lessor of the airport*, was in these circumstances the one who took the *air easement in the constitutional sense*. . . . We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. . . . A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. * * * *The glide path for the northeast runway is as necessary for the operation of the airport as is a surface highway for operation of a bridge*. . . . Without the "approach areas" an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that *by constitutional standards it did not acquire enough.*
>
> *Griggs v. Allegheny County*, 369 U.S. 84, at 89-90 (1962) (emphasis added).

The law is clear that where a person's use and enjoyment of property is severely impaired by aircraft noise there has been a "taking" within the meaning of the Fifth

and Fourteenth Amendments; and that the airport proprietor, in this case Chicago, is the entity liable for the taking. *See Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962); *City of Jacksonville v. Schumann*, 167 So.2d 95 (Fla.Dist.Ct.App. 1964); *Highline School District No. 401, King County v. Port of Seattle*, 87 Wash.2d 6, 548 P.2d 1085 (Wash. 1976).

Where the action is for inverse condemnation to recover compensation for interests in real estate taken by state or local governments, the majority rule in most jurisdictions – including Illinois – has long been that the appropriate statute of limitations is the statutory period for actions to recover land under adverse possession. *Petersen v. Port of Seattle*, 94 Wash.2d 479, 618 P.2d 67 (1980); *Brazos River Authority v. City of Graham*, 163 Tex. 167, 354 S.W.2d 99 (1961); *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977); *Faulk v. Missouri River & N.W. Ry.*, 28 S.D. 1, 132 N.W. 233 (1911); *Aylmore v. City of Seattle*, 100 Wash. 515, 171 P. 659 (1918); *Love v. Postal Telegraph-Cable Co.*, 221 N.C. 469, 20 S.E.2d 337 (1942); *accord DiSanto v. City of Warrenville*, 17 Ill. Dec. 289, 59 Ill.App.3d 931, 376 N.E.2d 288 (2d Dist. 1978); *People ex. rel. Markgraff v. Rosenfield*, 383 Ill. 468, 50 N.E.2d 479 (1943); *Cf. Village of Palatine v. Dahle*, 385 Ill. 621, 53 N.E.2d 608 (1944); *Rosenthal v. City of Crystal Lake*, 171 Ill.App.3d 428, 525 N.E.2d 1176, 121 Ill. Dec. 869 (2nd Dist. 1988); *Ruck v. Midwest Hunting and Fishing Club*, 104 Ill.App.2d 185, 243 N.E.2d 834 (2nd Dist. 1968).

The vast majority of courts, including those in Illinois, have ruled that where there is a "taking", the appropriate statute of limitations is the statutory period provided by the state adverse possession statute – 20 years in Illinois. Ill. Rev. Stat., ch. 110, Sec. 13-101. Courts have consistently rejected shorter limitation periods. Otherwise, bodies cloaked with condemnation authority could obtain

the legal equivalent of adverse possession in a far shorter period than statutorily required for adverse possession. Courts have recognized that the end result of an inverse condemnation action is to transfer an easement to the governmental body, the same easement that would be obtained with adverse possession.

The logic of tying the inverse condemnation for a *taking* to the statutory period for recovery of lands under adverse possession was stated in Lewis, *A Treatise on the Law of Eminent Domain in the United States*, Section 966 (3d ed. 1909):

> Where the Constitution requires compensation either expressly or as interpreted by the courts to be first made for property taken for public use, a law which casts the initiative upon the owner to prosecute his claim for compensation within a time limited or be barred is invalid. Where under such a constitution property is appropriated for public use without complying therewith, *the owners right to compensation is not barred, except by adverse possession for the prescriptive period.*
>
> *Lewis* at p. 1713 (emphasis added).

In *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977), the court stated the logic of this principle as follows:

> Inverse condemnation is analogous to an action by a private owner against another private individual or entity to recover the title to or possession of property. While the property owner cannot compel the return of the property taken because of the eminent domain power of the condemnor, he has a constitutional right as a substitute to just compensation for what was taken.
>
> 254 N.W.2d at 695.

In *Love v. Postal Telegraph-Cable Co.*, 221 N.C. 469, 20 S.E.2d 337 (1942), the Court stated:

> In short, in its broader aspect, the suit is to recover for the value of an easement, which can pass to the defendant only by grant, condemnation or prescription – this last by *adverse possession and continuous user [sic] for a period of twenty years.*
>
> The awarding of permanent damages would be equivalent to an easement by condemnation.
>
> 20 S.E. 2d at 338 (emphasis added).

Illinois follows the rule that where the action is for inverse condemnation for compensation for a taking, the applicable statute of limitations is the period of limitations established by statute for adverse possession.[5] In Illinois, that period is 20 years. Ill.Rev.Stat. ch. 110, Sec. 13-101.

The court in *DiSanto v. City of Warrenville*, 17 Ill. Dec. 289, 59 Ill.App.3d 931, 376 N.E.2d 288 (2d Dist. 1978), confronted an inverse condemnation action commenced more than five years following the alleged taking of sewer and

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[5] The Illinois Constitution mandates compensation for a "damaging" as well as a "taking". The statute of limitations for a "damaging" as opposed to a "taking" is five years. *Horn v. City of Chicago*, 403 Ill. 549, 87 N.E.2d 642 (1949), *appeal dismissed*, 338 U.S. 940 (1950). For flights *over* Bieneman's property – as in *Griggs* – the action is considered a "taking". The distinction between a taking and consequential damages is discussed at length in *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). In *Batten* – unlike the instant case – *there were no overflights*. Because there were no overflights, the court held that the injuries were "consequential damages" (306 F.2d at p. 583), and that the Fifth Amendment did not provide compensation for damaging as opposed to taking: "In construing and applying this constitutional provision the federal courts have long and consistently recognized the distinction between a taking and consequential damages. . . . Because of this rule, which denies recovery of consequential damages in the absence of any taking, many state constitutions provide in substance that private property shall not be taken or damaged without compensation. However, the federal obligation has not been so enlarged by statute or by constitutional amendment." 306 F.2d at 583-584.

water improvements. The court determined that no taking had occurred because these had been no physical invasion of DiSanto's property. Yet the court still rejected the city's argument that a taking claim would be barred by a statute of limitations. The court found that the 20-year adverse possession statute of limitations applied to inverse condemnation proceedings; and like this case, the 20-year period had not elapsed before the action was brought:

> We could not agree, however, that laches is a bar to Count V of the complaint. In that count the plaintiffs, in effect, asked for a writ of mandamus compelling the institution of eminent domain proceedings. * * * Since the limitations period for adverse possession of real property (20 years) had not run at the commencement of the action, the plaintiffs are not barred in Count V by the statute of limitations. (Ill. Rev. Stat. 1975, ch. 83, par. 1; *cf. Village of Palatine v. Dahle*, 385 Ill. 621, 628, 53 N.E.2d 608 (1944).
>
> 376 N.E.2d at 295 (1978).

Another Illinois case dealing with the statute of limitations pertinent to inverse condemnation takings is *People ex. rel. Markgraff v. Rosenfield*, 383 Ill. 468, 50 N.E.2d 479 (1943). In *Markgraff*, the plaintiffs and their predecessors in interest waited roughly twelve years to bring an action against the Department of Public Works and Buildings for appropriating some of their land for a highway without compensation. Because a special highway statute applied to adverse possession for highway construction (15 years vs. the normal 20 years), the court dealt with a 15 year statute for adverse possession:

> Unless the owner whose land is wrongfully taken acquiesces in the trespass, taking and use of the property for a public highway for the statutory period of fifteen years, such owner cannot be defeated of his right to compensation. Under section 139 of the Roads and Bridges Act (Ill. Rev. Stat. 1941 chap. 121, par. 152) in order that the

> Department acquire an easement by adverse use, such adverse possession must continue for a period of fifteen years.
>
> 50 N.E.2d at 481 (emphasis added).

Based on the above analysis, it is clear that the taking claim for inverse condemnation contained in Count III was governed by a 20-year statute of limitations. Since that period had not passed, Count III was not barred by the statute of limitations.

C. There Is Nothing In Either *Wilson* Or *Goodman* That Mandates Use Of The Personal Injury Statute Of Limitations To Govern A Direct Fifth Amendment Action For Just Compensation

Under normal practice, federal courts will borrow the most analogous state statute of limitations to govern a federal claim for which no statute of limitations has been prescribed by Congress. *Runyon v. McCrary*, 427 U.S. 160, 180 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397-398 (1906).

As discussed above, Illinois has a directly analogous cause of action to the federal constitutional claim for just compensation for a taking of real property. It is clear that for a "taking" of real property – be it a taking under the Illinois Constitution or the Federal Constitution – Illinois courts use the statutory period for adverse possession for real estate (20 years) as the statute of limitations. Thus, absent compelling reasons to the contrary, the jurisprudence of this Court dictates that federal courts should – under parallel enforcement of the Fifth Amendment right to just compensation for the taking of real property – apply the same statute of limitations as the Illinois courts.

There is nothing in the decisions of this Court in *Wilson* or *Goodman* that compels a different result. Both cases involve what this Court said were at heart "questions of

statutory construction," *Wilson*, 471 U.S. at 268: the intent of the 42nd Congress in enacting the Civil Rights Act of 1871 and the statute of limitations that Congress intended to apply to actions brought under the Act. In both cases this Court interpreted that the intent of the Congress in the 1871 Civil Rights statute to focus on personal injury oriented tort remedies.

> Among the potential analogies, Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury, than, for example, to claims for damages to property or breach of contract.
>
> *Wilson*, 471 U.S. at 277.

> Had the 42nd Congress expressly focused on the issue decided today, we believe it would have characterized Section 1983 as conferring a general remedy for injuries to personal rights.
>
> *Wilson*, 471 U.S. at 278.

> [B]ecause claims under Section 1983 are in essence claims for personal injury, the state statute applicable to such claims should be borrowed.
>
> *Goodman*, 107 S. Ct. at 2621.[6]

Thus, *Wilson* and *Goodman* were both predicated on this Court's conclusion that Congress would have applied a personal injury statute of limitations to actions under the 1871 Civil Rights Act. But there is nothing in the direct Fifth Amendment claim to recover just compensation for the seizure of an interest in real estate that even remotely suggests a personal injury action. Nor is there anything in the history of the Fifth Amendment's "Just Compensation Clause" which suggests that the concern there was personal injury – as opposed to protection of property.

---

[6] *Accord, Owens v. Okyre*,___U.S.___, 109 S.Ct. 573, 577 (1989).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in No. 88-2399.

Respectfully submitted,

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88-1497

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,

Petitioners,

v.

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and, USAIRLINES, INC.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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United States Court of Appeals

For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Date: January 5, 1989

Thomas F. Strubbe
Clerk
312-435-5850

Mr. H. Stuart Cunningham, Clerk
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Re: LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,
Plaintiff-Appellant

vs.

THE CITY OF CHICAGO, et al.,
Defendants-Appellees.

Appeal from the U.S.C.A.- 7

No. 84 C 10388

The Honorable **Harry D. Leinenweber,** Judge Presiding.

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P. 41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal. Please acknowledge receipt on the enclosed copy of this letter.

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3 Vols. Pleadings
2 Vols. Transcripts
2 Bound Vols.

/s/ MABEL L. BOBER
U.S.C.A. Deputy Clerk

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NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 13, 1988

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,
Plaintiff-Appellant,

No. 88-2399 *vs.*

CITY OF CHICAGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 84 C 10388

The Honorable **Harry D. Leinenweber,** Judge Presiding.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment is AFFIRMED to the extent it rejects all of Bineman's [sic] claims under the Constitution, the judgment is VACATED to the extent it holds that claims under state law are preempted, and the cause is REMANDED with directions that the Court relinquish jurisdiction under *Gibbs*, so that Bieneman may pursue his state-law contentions in state court, in accordance with the opinion of this Court filed this date. Each party shall bear its own costs on appeal.

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-2399

LAWRENCE C. BIENEMAN,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 10388—Harry D. Leinenweber, *Judge.*

SUBMITTED NOVEMBER 1, 1988—DECIDED DECEMBER 13, 1988*

Before POSNER, COFFEY, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Noise from O'Hare Airport is the subject of this case. Lawrence C. Bieneman, who bought a parcel of land near O'Hare in 1967 and has become a frequent filer, commenced this suit as a class action on behalf of all other residents of northern Illinois

* The case was orally argued on January 6, 1988, but we dismissed the appeal for want of jurisdiction because the judgment was not final. This new appeal, taken from a final judgment, has been submitted to the original panel for decision without a second oral argument.

adversely affected by noise.[1] Bieneman contended that the City of Chicago (which operates O'Hare) and the airlines using O'Hare intentionally reduced the value of his land by propagating noise and the chemicals in aircraft exhaust. Two counts of the complaint alleged a deprivation of property without due process, a third alleged a taking, and other counts made claims under state tort law.

Decisions by three district judges have left Bieneman empty-handed. Judge Decker dismissed the claims alleging deprivations of property without due process on the ground that entitlements to be free from nuisances and related torts are not "property" within the meaning of the Due Process Clause. Judge Duff, to whom the case was transferred, dismissed the remaining claims. 662 F. Supp. 1297 (N.D. Ill. 1987). Any taking occurred no later than 1976, Judge Duff concluded, so that this suit, filed in 1984, is untimely. The state claims presented under the court's pendent jurisdiction all had been preempted by federal statutes and regulations, Judge Duff concluded in reliance on *Luedtke v. County of Milwaukee*, 521 F.2d 387, 391 (7th Cir. 1975). Although Judge Duff reserved decision on the complaint's demand to proceed as a class action, 662 F. Supp. at 1298 n.1, Bieneman filed a notice of appeal. After we dismissed this as premature, 838 F.2d 962 (7th Cir. 1988), Bieneman asked the district court to certify a class limited to some of the legal issues in the case. By then the case had been transferred to Judge

[1] Bieneman became Mayor of Bensenville, Illinois, and that village, joined by three others, filed suit in state court seeking an injunction against the expansion of O'Hare. The villages lost. *Village of Bensenville v. City of Chicago*, 16 Ill. App. 3d 733, 306 N.E.2d 562 (1st Dist. 1973). Bieneman, as Mayor of Bensenville, was among the signatories to a consent decree affecting planning for growth at O'Hare. *Illinois ex rel. Scott v. Butterfield*, No. 74 C 2440 (N.D. Ill. 1974). Bieneman personally was among the plaintiffs in a case challenging the Federal Aviation Administration's plan of redevelopment at O'Hare—another defeat. *Suburban O'Hare Commission v. Dole*, 787 F.2d 186 (7th Cir. 1986). So this case is at least the fourth for Bieneman on the topic.

Leinenweber, who denied the motion. Judge Leinenweber doubted whether Bieneman, who had lost the case on the merits, was an adequate representative of the class; at all events, the judge thought that the prospect of inconsistent decisions on legal questions was insufficient to call for certification of a class, given the disparate interests of the many thousands of persons affected by operations at O'Hare Airport. Bieneman again appeals, this time from a final judgment.

I

Bieneman contests the district court's refusal to certify the case as a class action. Unless the district court abused its discretion, we must respect its decision. *Patterson v. General Motors Corp.*, 631 F.2d 476, 480 (7th Cir. 1980); *Adashunas v. Negley*, 626 F.2d 600, 605 (7th Cir. 1980); *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977). There was no abuse. Bieneman's proposed class contained at least 300,000 persons. Some of these undoubtedly derive great benefit from increased operations at O'Hare, which make the area attractive for business and may increase the value of land, even as they make land less attractive for residential purposes. The magnitude of any effect on residential owners depends on topography, flight patterns, and many other variables; homeowners who want to sell to businesses (or are in areas zoned for business) may benefit from extra flights and so oppose homeowners differently situated. No wonder courts routinely decline to certify classes in airport-noise cases. E.g., *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 575 (E.D. Va. 1972), affirmed in relevant part, 541 F.2d 442 (4th Cir. 1976); *Town of East Haven v. Eastern Airlines, Inc.*, 331 F. Supp. 16, 18 (D. Conn. 1971), affirmed, 470 F.2d 148 (2d Cir. 1972); *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509 (Minn. 1985); *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal. 3d 447, 525 P.2d 701 (1974).

Conceding this, Bieneman insists that the district court should have certified a class for purposes of legal ques-

tions only, such as preemption and the length of the statute of limitations. Such a class could prevent inconsistent outcomes in multifarious cases, achieving the objective of Fed. R. Civ. P. 23(b)(1). Maybe so; some courts have given class treatment to questions of law while reserving issues of fact for individual resolution. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988); *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 166-67 (2d Cir. 1987); *In re School Asbestos Litigation*, 789 F.2d 996, 1008-10 (3d Cir. 1986). That this *may* be done does not mean that it *must* be. A court does not abuse its discretion in failing to employ novel procedural devices, especially when there are serious doubts about the adequacy of the plaintiff's representation of the class, even about the existence of a case or controversy with regard to a certification of the sort Bieneman proposes. A class limited to legal claims (such as identifying the period of limitations), leaving the class members to file separate suits if they want to take advantage of the ruling, does not resolve any concrete case, and it looks suspiciously like a request for an advisory opinion. (*Sterling*, *Agent Orange*, and similar opinions contemplated that questions not covered by the class certification would be resolved by further proceedings in the same case, avoiding this problem.)

Bieneman filed this case as a class action yet pursued it for more then three years without asking the district court to certify a class; he appealed, leaving the class behind, and recovered his zeal to serve as representative only on learning that disposition of the class claim was essential to his own claim. We suggested on the first appeal that "a class representative who has lost on the merits may have a duty to the class to oppose certification, to avoid the preclusive effect of the judgment". 838 F.2d at 964. Bieneman nonetheless pressed on. What he pressed, however, was a motion for partial certification, abandoning members of the class pleaded in the complaint and many of the issues originally identified for class treatment, in the teeth of our observation that a representative

may not unilaterally abandon the class, 838 F.2d at 963. The district court was entitled to doubt that Bieneman is a fit representative of other land owners. See *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). This is quite enough to support Judge Leinenweber's decision, and we resolve no other questions concerning class certification.

II

Bieneman alleges that noise and noxious gasses emanating from O'Hare Airport deprive him of property without due process of law, and so allow a remedy under 42 U.S.C. §1983. The contention is fundamentally that O'Hare is a nuisance, traditionally a subject of state law. Judge Decker believed that maintaining a nuisance does not deprive anyone of "liberty or property" within the meaning of the Due Process Clause. The desire to prosecute a nuisance suit is not based on either liberty or property, the judge held in reliance on *Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983), and *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983). As we see things, however, the right question is not whether there is or may be property in a chose in action—to which the answer, if pertinent, is "yes". See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Sending waves of noise across a stranger's land can "take" his property, see *United States v. Causby*, 328 U.S. 256 (1946), and therefore must be able to "deprive" him of "liberty or property" too. The property interest is in the land, not in the right to litigate. That the state's conduct concerning the land is tortious does not eliminate a liberty or property element that otherwise exists. *Brown*, *Jackson*, and similar cases do not depend on a belief that obnoxious conduct by the state cannot deprive a person of liberty or property. They hold, rather, that the Constitution does not require the state to use civil or criminal process to protect its residents from private aggression or ameliorate the vicissitudes of life. See generally *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc).

The state is the aggressor in our case, however. The complaint alleges that state actors manage O'Hare Airport so as to inflict injury on private persons. This formally states a constitutional claim. The immediate hurdle for Bieneman, however, is the principle that negligent conduct does not violate the Due Process Clause, *Daniels v. Williams*, 474 U.S. 327 (1986), and we added in *Archie* that grossly negligent conduct should be treated just like negligence. 847 F.2d at 1218-20. To get anywhere, Bieneman must show that the City of Chicago intentionally or recklessly inflicted injury without due process of law. This is so whether he contends that the violation is procedural or substantive.[2]

No one supposes that the City of Chicago set out to aggravate Mr. Bieneman by jacking up the levels of noise at O'Hare Airport. He is not a member of some prostrate group; owners of land near O'Hare are among the wealthiest and most influential people in Illinois; noise injures without regard to race, religion, and political beliefs. To show "intent" (or at least recklessness), Bieneman maintains that Chicago knows the effect of noise and exhaust gasses, yet does nothing to aid their victims. Put in this way, however, the argument is no different from the one in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Statutes reserving public jobs for veterans assist a group almost all members of which are male. Women seeking the jobs contended that the state must have "intended" to do them injury, because everyone intends the natural and probable consequences of his acts—and the consequences of the preference law were apparent. The Supreme Court took a different view of intent in constitutional law, however, distinguishing knowledge from intent, byproduct from objective. A state may know what its laws do, yet may not "intend" all of the

---

[2] Whether there is such an animal as "substantive due process" when the state affects property that it could choose to take outright is a subject we need not pursue. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988).

consequences. Some of them may be unwelcome fallout from activities undertaken for another reason. The essential question, as the Court saw things, was whether the state acted "at least in part 'because of,' not merely 'in spite of,' [the] adverse effects upon an identifiable group." 442 U.S. at 279.

Chicago intends to operate O'Hare Airport, knowing that noise and pollution occur. But it does not operate O'Hare because this is the best way to create noise and fumes. These are unwelcome byproducts. A good way to put the intent question is: "If the consequence at issue were smaller, or its effect were reversed, would the actor find the activity less attractive?" If planes made less noise, would Chicago curtail the size and hours of operation of O'Hare? To put the question this way is to show that Bieneman cannot establish intent.

Recklessness is a proxy for intent, and Bieneman fares no better with the claim that Chicago gratuitously subjects him to noise and pollution. He might say that a government acts recklessly toward something if the government accords it no weight—in prison cases, for example, we say the guards act recklessly if they accord the interests of prisoners no weight and so disdain cries of distress. One might ask from this perspective whether the City would operate O'Hare differently if it owned all of the surrounding land. Cf. William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & Econ. 1 (1972). If Chicago would behave no differently, then it must be holding property owners' interests as dear as its own, the pole away from recklessness. Bieneman's complaint does not allege that the City allows O'Hare to be noisier or dirtier than it would if the government owned the surrounding land, and at oral argument Bieneman's counsel denied that it does. This aspect of the case therefore stands or falls on the proposition to know of an adverse consequence, and to do nothing to palliate things, is to "intend" that consequence. Under *Feeney*, the contention fails.

III

Protests about "deprivations" without due process sound tinny when the state is free to take what it wants—with or without process—so long as it is prepared to pay. A state may take property outright or may condemn an easement for noise, and sometimes under the Constitution it must do so, see *Causby*, although airport noise rarely requires compensation, *Griggs v. Allegheny County*, 369 U.S. 84 (1962). See also *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233-41 (1897) (applying the Takings Clause of the fifth amendment to the states through the fourteenth). The right step logically is an inverse condemnation action. Bieneman contends that the noise at O'Hare took his land—or at least an easement—no later than 1976, when, Bieneman believes, the din became unbearable. Since this suit was filed eight years later, the defendants insist that it is untimely.

A suit under 42 U.S.C. §1983 must be filed within the time allowed by state law for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261 (1985). See also *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987) (same for §1981). In Illinois that period is two years, although we held in *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986), that in light of cases before *Garcia* that might have engendered reliance on a longer period, the plaintiff would be allowed two years from the decision in *Garcia* or five years from the time the claim accrued, whichever is shorter. Bieneman contends that Chicago took his property in 1976, so under *Anton* he had until 1981 to file a §1983 action. Bieneman attempts to avoid that outcome by insisting that the takings claim rests on the Constitution rather than §1983. The district court disagreed, holding that constitutional inverse condemnation suits against state actors depend on §1983. 662 F. Supp. at 1299-1300. We know from *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2386 n.9 (1987), that takings suits may be filed directly under the Constitution. It follows, Bieneman contends, that we should use as the limitations period the most analogous period

drawn from state law—which, he submits, is the 20-year time allowed to bring adverse possession actions, a period applied to inverse condemnation suits against governmental units. E.g., *Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 525 N.E.2d 1176 (2d Dist. 1988); *DiSanto v. City of Warrenville*, 59 Ill. App. 3d 931, 376 N.E.2d 288 (2d Dist. 1978).

The line of argument works only if three things hold: first, that state rather than federal law supplies the period of limitations for a claim arising directly under the Constitution; second, that the period for adverse possession is the most analogous period of state law; third, that the existence of a claim directly under the Constitution cancels the holding of *Garcia* that the period of limitations applicable to personal injuries governs all constitutional torts, even though state law might use different periods for different wrongs. Each is questionable. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759 (1987), which applied a four-year period from antitrust law to suits under a different federal statute that did not contain its own period of limitations, shows that the custom of recurring to state law for periods of limitations is not the same as a rule requiring their absorption. See also *DelCostello v. Teamsters*, 462 U.S. 151 (1983) (applying the six-month period from the National Labor Relations Act to "hybrid" contract-duty of fair representation cases); *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir. 1988) (en banc) (applying the three-year period contained in federal securities laws to implied federal rights of action); *Smith v. City of Chicago*, 769 F.2d 408 (7th Cir. 1985) (applying a six-month period derived from federal employment laws to actions enforcing rights under a federal consent decree). An appropriate benchmark for this purpose might be the six years provided by 28 U.S.C. §2401(a) for suits against the United States, a period that is employed to mark the outer limits for purposes of inverse condemnation actions under the Tucker Act, 28 U.S.C. §1491(a)(1). *United States v. 422,978 Square Feet of Land*, 445 F.2d 1180, 1187-89 (9th Cir. 1971); *Stubbs v. United*

States, 620 F.2d 775, 784 (10th Cir. 1980); cf. *Kabua v. United States*, 546 F.2d 381, 383 (Ct. Cl. 1976). If this six-year period were applied, Bieneman still would be out of court.[3] And Chicago contests the submission that if state law supplies a period of limitations, the 20-year adverse possession rule is the most closely analogous. We shall go no further along either path, however, for the third condition cannot be satisfied.

Garcia and *Goodman*, which established the periods of limitations applicable under §1983 and §1981, resolved two questions: *where* to get the period of limitations, and *which* period to use. The answer to the first of these questions, based on 42 U.S.C. §1988, was "state law". Section 1988 does not apply to a case in which the Constitution rather than a civil rights statute supplies the remedy, although the Rules of Decision Act, 28 U.S.C. §1652, might have the same effect for other federal litigation. The second question has two parts: (a) shall there be a single period of limitations for all §§ 1981 and 1983 cases, or should different periods be used for different patterns (some analogized to contracts, some to intentional torts, some to negligent torts, some left to the catch-all statute)?, and (b) if one period is to be used, which? *Garcia* and *Goodman* concluded that only one period should be borrowed from state law, the one generally applicable to personal injuries.[4]

---

[3] The 12-year period in the Quiet Title Act, 28 U.S.C. §2409a(f), might be an alternative benchmark, but this statute applies only when the government claims an interest in land. See *United States v. Mottaz*, 476 U.S. 834 (1986); *Block v. North Dakota*, 461 U.S. 273 (1983). The point of Bieneman's suit is that the government *dis*claims an interest in his land but ought to be forced to pay for it anyway, the classic inverse condemnation action.

[4] The Court has heard oral argument in *Owens v. Okure*, 816 F.2d 45 (2d Cir. 1987), cert. granted, 108 S. Ct. 1218 (1988), which presents the question whether a different rule should apply when the state has a special period of limitations for intentional torts. This complication need not detain us.

These decisions—whether to have a single period, and which period to use—do not depend on §1988. Nothing in the text or history of that statute speaks to the questions. The Court had to devise its own rule, and it made a practical choice for compelling reasons:

> The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of §1983. Almost every §1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations. . . . If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each §1983 claim. . . . The simplicity of the admonition in §1988 [to use state law] is consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation. Moreover, the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters.

Garcia, 471 U.S. at 272-75 (footnotes omitted). See also *Agency Holding*, 107 S. Ct. at 2763-64.

These considerations apply with equal force to claims invoking the Constitution directly. Actions under §1983 and those under the principal fount of direct suits, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), are identical save for the replacement of a state actor (§1983)

by a federal actor (*Bivens*). No wonder the only two courts of appeals that have addressed questions concerning limitations under *Bivens* have held that the rules used for §1983 suits will be applied in full force to *Bivens* cases. *Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987); *McSurely v. Hutchison*, 823 F.2d 1002, 1004-05 (6th Cir. 1987). When the defendant is a state actor, §1983 and direct litigation may be interchangeable, the choice between them adventitious. There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy.

Harmonizing the "direct" suit with the §1983 suit requires us to go the rest of the way with *Wilson v. Garcia*. The Supreme Court applied the period for personal injuries to all §1983 cases, recognizing that §1983 covers many wrongs that states, for domestic purposes, would classify under different statutes. To avoid enervating litigation, the period for direct actions must be the same as the period for §1983 actions. So pleading this case as a claim directly under the Takings Clause leaves Bieneman exactly where pleading it under §1983 would have left him: with five years from the wrong, or two years from *Wilson*, whichever is less, to file the complaint. Bieneman missed the time by three years, and the district court properly granted summary judgment for the defendants.

IV

There remain questions of Illinois law, laid under the pendent jurisdiction. "[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The district court did not dismiss them but resolved them

on the merits—adversely to Bieneman. The court did not give a reason for doing so or recognize that there might be a problem in disposing of state questions after the basis of federal jurisdiction evaporated.

The dictum given unqualified in *Gibbs* has been qualified in practice. See *Rosado v. Wyman*, 397 U.S. 397, 404-05 (1970). Although this court regularly directs district judges to remit pendent state claims to state court after wrapping up the federal issues before trial, e.g., *Baltimore Orioles, Inc. v. Major League Baseball Players' Ass'n*, 805 F.2d 663, 682 (7th Cir. 1986), we recognize that courts sometimes ought to dispose of everything at once, that prompt resolution may be dramatically more efficient, justifying the displacement of state questions to the federal tribunal. See *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936, 945-46 (7th Cir. 1988) (collecting cases). The failings in the federal issues may carry over to the state claims. *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1178 (7th Cir. 1987). Or there might be a federal defense to the state claims, one appropriately resolved by a federal court. *Graf v. Elgin, Joliet & Eastern Ry.*, 790 F.2d 1341, 1345-48 (7th Cir. 1986). Our case is of this kind. The defendants contended, and the district court held in reliance on *Luedtke*, that federal law preempts any claims otherwise available under state law. 662 F. Supp. at 1300-01. Bieneman recognizes that *Luedtke* governs and asks us to overrule it, which a state court could not do. *Gibbs* permits a federal court to proceed in such a case.

Luedtke offered this analysis, which we quote in full: "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank* [*v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)], the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, §114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. . . . To the extent that the County may be violating the federal laws or regulations, the plaintiffs should . . . exhaust their ad-

ministrative remedies." 521 F.2d at 391. Since *Luedtke* every court that has examined the question independently has come to the opposite conclusion. *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 100, 603 P.2d 1329, 1336 (1979), cert. denied, 449 U.S. 820 (1980); *Owen v. City of Atlanta*, 157 Ga. App. 354, 277 S.E.2d 338, affirmed, 248 Ga. 299, 282 S.E.2d 906 (1981); *Krueger v. Mitchell*, 112 Wis. 2d 88, 101, 332 N.W.2d 733, 739 (1983); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal. 3d 862, 705 P.2d 866 (1985); *Ursin v. New Orleans Aviation Board*, 506 So. 2d 947, 955 (La. App. 5th Cir. 1987).[5] The Solicitor General, in a brief filed at the Supreme Court's invitation in *Greater Westchester*, informed the Court that *Luedtke* had been decided incorrectly but that because *Luedtke* stood alone the conflict did not require resolution.

We must decide whether to maintain a go-it-alone position. Three things persuade us that *Luedtke* is incorrect and that we should fess up to the error.

1. Preemption of state law depends on either a comprehensive federal regimen ("occupation of the field"), usually established by express statutory declaration, or a clash between state and federal norms (a fight that the federal rules win under the Supremacy Clause). *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). See also, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99 (1984) (collecting cases); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986); *CTS Corp. v. Dynamics Corp.*, 107 S. Ct. 1637 (1987). The Federal Aviation Act does not expressly preempt state damages remedies. To the contrary, §1106 of the Federal Aviation Act, 49 U.S.C. App. §1506, provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions

[5] *Bryski v. City of Chicago*, 148 Ill. App. 3d 556, 499 N.E.2d 162 (2d Dist. 1986), finds state claims preempted on the authority of *Luedtke*.

of this chapter are in addition to such remedies." *Luedtke* did not mention this anti-preemption statute. Statutes of this sort save common law remedies even when federal law exclusively determines the content of substantive rules. *International Paper Co. v. Ouelette*, 479 U.S. 481, 497-98 (1987); *Brown v. Hotel Employees*, 468 U.S. 491, 505-07 (1984). Section 1106 is no exception. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298-300 (1976), holds that §1106 preserves against preemption a claim for fraudulent misrepresentation in selling tickets for air travel. State courts award compensation for takings in inverse condemnation cases, although if there is complete federal preemption the national rather than the local government should be the payor. State courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel. If damages are available for takings, and common law remedies are available on questions of fraud and safety, why not on questions of noise and chemical emissions?

2. *Burbank*, on which we relied in *Luedtke*, was a different kind of problem altogether. The City of Burbank had enacted a curfew, forbidding departures of jet aircraft from a privately-owned airport between 11 p.m. and 7 a.m. This directly regulated the airport's operations, interfering with the Federal Aviation Administration's contrary judgment. The Supreme Court distinguished in *Burbank* between the state's role as a regulator and its role as a proprietor of airports, observing that it was not questioning the ability of a governmental body to determine how it would run its own airports. 411 U.S. at 635-36 & n.14. It stepped back from this issue because both reports on the statute establishing federal noise rules stated expressly that local governments could set their own standards as proprietors. See H.R. Rep. 92-842, 92d Cong., 2d Sess. 8-10 (1972); S. Rep. 92-1160, 92d Cong., 2d Sess. 10-11 (1972).

So Illinois has some role notwithstanding *Burbank* in governing the amount of noise and pollution that escapes from O'Hare. We need not and do not say just what the

role is, although other courts have read *Burbank* as allowing a state to exclude certain kinds of aircraft in order to reduce noise. E.g., *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977) (exclusion of Concorde). Illinois might choose to exercise such powers as it has through the City of Chicago, the "owner" of O'Hare. It might withdraw home rule from Chicago and exercise these powers through legislation of general application. Or it might exercise these powers through the courts. Neither the Constitution nor the Federal Aviation Act, as amended by the Noise Control Act of 1972, determines how Illinois apportions its governmental powers. *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908); *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902); *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155 (7th Cir. 1985). Whether Illinois should allow its courts some role in setting noise levels at O'Hare is the state's business. The federal role is limited to defining the powers of the state as an entity. Given the recognition in *Burbank* that the state may govern the operation of airports it owns, the conclusion in *Luedtke* that every conceivable role for state courts has been preempted is untenable.

3. *Burbank* dealt with regulation: the city enacted a substantive rule. Bieneman wants damages, not regulation. Perhaps this is a distinction without a difference. An award of damages is compensatory from Bieneman's perspective, but from O'Hare's it is no different from regulation. The airport and the air carriers see the award of damages as a signal to stop doing whatever led to the decision, just as the monetary penalty for violating an express substantive rule would lead them to desist. Damages for disobeying an acknowledged rule discourage that disobedience and also induce potential defendants to steer clear of the danger zone, to discontinue conduct that in fact complies with the rule but could be mistaken for non-

compliance. It is hard (and costly) to determine facts, and the errors inevitable in litigation may discourage beneficial conduct. So too, excessive awards might discourage conduct that is questionable under existing rules but beneficial on balance (and therefore goes unchallenged by the agency with control of the substantive doctrines).

The identity of common law damages and penalties for disobedience to substantive rules could lead to a conclusion that where a state is forbidden to alter the substantive rule, it is forbidden to award damages. *Silkwood v. Kerr-McGee* rejects this equation, however. The Court held in *Pacific Gas & Electric Co. v. State Energy Conservation & Development Comm'n*, 461 U.S. 190 (1983), that federal law occupies the field of nuclear safety regulation. Notwithstanding the argument (indeed the truism) that an award of hefty compensatory and punitive damages is a method of regulating safety, the Court concluded that federal law does not preempt common law remedies concerning nuclear safety. "*Silkwood* . . . highlights the extreme reluctance of the modern Court to find preemption." Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Constitutional Commentary 311, 317 (1988). If no preemption is the conclusion notwithstanding the absence from nuclear safety legislation of a statute such as §1106, it must be the appropriate treatment of air travel as well.

Luedtke did not mention any of these considerations, and its holding cannot be maintained in the face of them. We overrule *Luedtke* to the extent it holds that all common law remedies for airport noise and pollution have been preempted by federal law.[6]

[6] Because this opinion overrules a portion of the decision in *Luedtke*, it was circulated to all judges in regular active service under Circuit Rule 40(f). No judge requested that the case be heard en banc.

A word on what this means. Bieneman wants common law remedies, but these must be remedies for *wrongs*, as in *Silkwood*, or for those aspects of airport operation within the state's control as proprietor under *Burbank*. Federal law governs much of the conduct of O'Hare and its carriers. See 14 C.F.R. Part 36 (noise characteristics of aircraft), Part 150 (noise abatement procedures at airports). A state court could not award damages against O'Hare or its users for conduct required by these regulations, or for not engaging in noise-abatement procedures that the Federal Aviation Administration considered but rejected as unsafe. Bieneman's complaint suggests that damages should be awarded because there are too many flights per hour, or because the aircraft are older models not fitted with high-bypass turbofan engines, or because the planes do not climb at a sufficiently steep rate after takeoff. These subjects are governed by federal law, and a state may not use common law procedures to question federal decisions or extract money from those who abide by them. There may be, on the other hand, aspects of O'Hare's operations that offend federal law, or that federal norms do not govern. Perhaps, as Bieneman insists, the airport does not use adequate noise baffles around the perimeter of the airport, or perhaps it has built more runways than federal law requires (to the detriment of those under the new ones), or is out of compliance with the governing federal rules. The essential point is that the state may employ damages remedies only to enforce federal requirements (as in *Silkwood*) or to regulate aspects of airport operation over which the state has discretionary authority.

This disposes of the federal defense to the claims under state law. Remaining questions about the common law of Illinois are more appropriately resolved in state court, since no ground of federal jurisdiction survives. We therefore affirm the district court's judgment to the extent it rejects all of Bieneman's claims under the Constitution, vacate the judgment to the extent it holds that claims under state law are preempted, and remand with directions that the court relinquish jurisdiction under *Gibbs*,

so that Bieneman may pursue his state-law contentions in state court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE C. BIENEMAN

v.

THE CITY OF CHICAGO, ET AL.

JUDGMENT IN A CIVIL CASE
DOCKETED
JUNE 28, 1988
CASE NUMBER:
84 C 10388

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the court having previously granted defendants' motion to dismiss on June 8, 1987, the court now denies plaintiff's motion for class certification for the reasons stated in open court. Therefore the cause of action of plaintiff is dismissed with prejudice.

Date: June 24, 1988

H. STUART CUNNINGHAM
Clerk

/s/ WANDA PARKER
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Minute Order Form

LAWRENCE C. BIENEMAN

v.

THE CITY OF CHICAGO, ET AL.

Date: June 24, 1988
Case Number 84 C 10388
The Honorable
Harry D. Leinenweber,
Judge Presiding.

DOCKET ENTRY:

Judgment is entered as follows:

The court having previously granted defendants' motion to dismiss on June 8, 1987, the court now denies plaintiff's motion for class certification for the reasons stated in open court.

This case is hereby dismissed with prejudice.

Docketing to mail notices.

Mail AO 450 form.

Courtroom deputy's initials: WAP

Date received in central Clerk's Office: June 28, 1988

Date Docketed: June 28, 1988

Document # 139

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE C. BIENEMAN,
Plaintiff,
vs.
THE CITY OF CHICAGO, et al.,
Defendants.

Docket No. 84 C 10388

88-2399

Docket No. 85 C 10295

DELBERT M. BIDDISON,
Plaintiff,
vs.
THE CITY OF CHICAGO, et al.,
Defendants.

Chicago, Illinois
June 24, 1988
9:00 O'Clock A.M.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE HARRY D. LEINEWEBER

APPEARANCES:

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Chicago, Illinois 60610)

For the Defendants: MR. MICHAEL M. CONWAY
(Messrs. Hopkins & Sutter
Three First National Plaza
Chicago, Illinois 60602)

MR. CALVIN P. SAWYIER
(Messrs. Winston & Strawn
One First National Plaza
Chicago, Illinois 60602)

Court Reporter:

JAMES W. CHEEK
Official Reporter
United States District Court
219 S. Dearborn St. - Rm. 1714
Chicago, Illinois 60604

Docketed July 11, 1988

Filed August 3, 1988
Thomas F. Strubbe
Clerk

THE CLERK: 84 C 10388, Biedeman [sic] vs. City of Chicago and 85 C 10295, Biddison vs. City of Chicago.

THE COURT: This cause is before the court on the motion of plaintiffs for class certification on certain legal issues in the case of Biedeman [sic] vs. City of Chicago and the case of Biddison vs. the City of Chicago, which has previously been ordered related.

Plaintiffs filed these actions in their own behalf and behalf of all persons similarly situated for personal injuries and property damages resulting from noise and air pollution emanating from O'Hare International Airport. The case was originally assigned to Judge Duff, who decided the Bieneman case on motion, dismissing plaintiff's complaint on June 8th, 1987. Judge Duff had not made a determination as to whether the case might be maintained as a class action. Judge Duff's decision was appealed and the Seventh Circuit held that until the district court determined whether the case might proceed as a class action the order of Judge Duff was not final and appealable. Plaintiff filed the present motion on February 3rd, 1988, and this case was subsequently reassigned to this court.

The proposed class consists of all persons in Cook or DuPage County, Illinois who reside under or adjacent to the flight paths of aircraft approaching, departing or circling O'Hare International Airport. Plaintiff's subclass A consists of all persons whose property is so located and who claim that the City of Chicago, by reason of O'Hare aircraft operations, has taken an aviation easement in their property without compensation, in violation of the Fifth Amendment.

Plaintiff's proposed Subclass B consists of all persons who merely reside in such location and who claim that Chicago, by reason of O'Hare aircraft operations, has caused them injury to their person or to their personal or real property and who wish to pursue tort damage remedies provided by state law.

An action may be maintained as a class action under rule 23 only if the prerequisites of both Section (a) and one of the subsections of Section (b) are met. The parties have addressed their arguments to each subsection of (b) of Rule 23; the Court will do likewise.

Under Rule 23(b)(1)(A) a class should be certified only if there is a danger of establishing incompatible standards of conduct for the party opposing the class.

Although plaintiff seeks some declaratory and injunctive relief, the primary goal of this lawsuit is for money damages. The danger of establishing incompatible standards of conduct is normally not posed by a suit for money damages. Zimmerman vs. Bell, 800 F. 2d 386 (4th Cir. 1986). Therefore, the proposed class may not be certified under this section.

There are two situations in which a class should be certified under Rule 23(b)(1)(B): Where adjudication as to one member will effectively dispose of the interests of all class members, and where adjudication as to one member will substantially impair or impede the other's ability to protect their interests. Plaintiff asserts that this case fits within the second situation.

Here, adjudication of these legal issues by plaintiff will not preclude other class members fro winning his or her case except to the extent that the adjudication serves as precedent. Plaintiff has suggested no reason why the rest of the proposed class would be foreclosed from suit except to that extent.

Rule 23(b)(2) applies to cases involving final adjudicative relief or corresponding declaratory relief. Essential to a claim to this provision is that the case be primarily one for injunctive relief. Walters vs. Thompson, 615 F. Supp. 330 (N.D. Ill. 1985) Declaratory relief which has its primary purpose to provide a foundation for subsequent claims of damages does not come within this rule. Serafin vs. Sears, Roebuck & Co. Inc., 446 F. Supp. 611 (N.D. Ill.

1978); Evans vs. City of Chicago, 522 F. Supp. 789 (N.D. Ill. 1986) affirmed in part, vacated in part on other ground, 689 F. 2d 1286 (7th Cir. 1982).

The Court has already found that the primary relief sought in this case is money damages and not declaratory or injunctive relief. Accordingly, the proposed class may not be certified under any provision of Rule 23(b).

The Court also expresses doubt about whether Bieneman plaintiff, who has already lost at the trial level, could fairly and adequately represent the class. For the reasons stated, the motion to certify is denied in both Bieneman and Biddison vs. City of Chicago, the related case. Accordingly, the Bieneman vs. City of Chicago cause of action, the last issue having been resolved, is therefore dismissed with prejudice.

Now we will proceed to summary judgment on –

MR. KARAGANIS: Your Honor, having been bloodied on this issue, may we request a judgment order from the Court, a final judgment order from the Court?

THE COURT: That is what I intended to do when I say, "your cause of action is dismissed with prejudice in Bieneman."

MR. KARAGANIS: I am sorry. Joseph Karaganis for the plaintiff, your Honor.

MR. CONWAY: Good morning, your Honor, Michael Conway for the City defendants.

MR. SAWYIER: Calvin Sawyier for the airline defendants.

MR. CONWAY: There is a recent Seventh Circuit case that indicates that the parties are to request the Court to have an order entered under – I guess it's Rule 54 – as a final judgment order.

MR. SAWYIER: An order in writing or perhaps a 54(b) finding in the Bieneman case might be helpful.

MR. CONWAY: No, we don't need a finding –

MR. KARAGANIS: You don't need a 54(b).

MR. SAWYIER: All right, all right.

THE COURT: We will have a final judgment order entered in the case.

MR. CONWAY: Your Honor, turning to the Biddison case. Your Honor continued to this morning our motion to request the plaintiffs to file their responsive brief to the summary judgment motion which is pending to the only remaining count, Count III, of the Biddison action. Your Honor continued that to this morning. We would renew our request that the plaintiff be directed to file a response.

THE COURT: You expressed a problem with time.

MR. KARAGANIS: Both with time, your Honor, and we also filed – when we were last here we filed a motion to compel production of documents which the Court deferred until its ruling today. We suggested, as a preliminary matter, that the question of withheld documents needs to be resolved. We filed our motion. We are prepared to adhere to a short briefing schedule on that.

We indicated, your Honor, that most of my firm is going to be on trial in the Southern District of Indiana for the bulk of the month of July if not all of July and we will not be getting back until sometime in August. We intend, upon coming back, once the document issue is resolved, to request leave of court to take the depositions of the expert or other witnesses for which affidavits were filed. There are only two that the City filed, one a Mary Vigilante and the other a Mr. Butler. Upon taking of those depositions we would be prepared to file our response.

MR. CONWAY: Well, your Honor, that is all well and good. It has been two years since we filed our motion. We We [sic] are glad to refer to the motion to compel as characterized by counsel. It is really a motion challenging our assertion privilege document list that we prepared. That probably should be referred to a magistrate as the expeditious way to do that.

Your Honor, we would request that this be briefed in some reasonable time and not just be continued off generally.

THE COURT: The motion to compel production of documents will be referred to the magistrate assigned to the file.

Let's see. Do we know who has been assigned?

MR. CONWAY: We have never had any dealings with the magistrate in this matter. So, I honestly don't know.

THE COURT: This is before the automatic.

THE CLERK: It will be by lot.

THE COURT: It will be referred to the Executive Committee for re-assignment to a magistrate for purposes of consideration of plaintiff's motion to compel production of documents.

MR. KARAGANIS: Your Honor, if I might suggest, we would be prepared, subject to our availability of getting their witnesses for deposition, to file our response 60 days from the ruling by the magistrate. In other words, if the magistrate rules against us, we will prepare our response in 60 days. If the magistrate rules for us and we get the documents, we will still work within 60 days.

THE COURT: That seems to be pretty long if we are going to wait for the magistrate to rule.

MR. CONWAY: It does to me.

MR. KARAGANIS: Judge, the documents may be highly relevant to our response.

THE COURT: I know. I am not saying that. How about 30 days from the ruling of the magistrate?

MR. KARAGANIS: Judge, it is a question of getting the depositions of the witnesses.

MR. CONWAY: Why can't they take the depositions now and, if there are some further documents that are produced, they can –

THE COURT: I will require the plaintiff to respond to the motion for summary judgment 30 days from the date of the ruling of the magistrate on the motion to produce.

MR. KARAGANIS: Thank you, Judge.

MR. CONWAY: Your Honor, I have one other suggestion, if I might, on Biddison. Since the class issue, which your Honor has decided this morning is the same in both cases, and the seven counts that are dismissed by Judge Duff are identical, one count remaining, it would seem appropriate that that class issue be reviewed if plaintiff intends to raise it on appeal – I don't know if he does – together. So, I would request that a 54(b) finding be made on the seven counts of Biddison, which Judge Duff also dismissed, so that any appeal on the class in Biddison and Bieneman and so forth would be handled together.

MR. KARAGANIS: Judge, if I express a certain gun shyness with respect to the current status of what we have got to do up in the Seventh Circuit – Bieneman is clean. The Court has indicated to us that it looks askance on 54(b) certifications. I just as soon see Bieneman get up and get decided. It will obviously have an impact on Biddison.

THE COURT: I think, to the extent that Bieneman will be precedent –

MR. CONWAY: My only concern in that respect, your Honor, is that while you have ruled on grounds uniform to both, relating to aspects of Rule 23(b), you have made the reference in your ruling to Mr. Bieneman's peculiar situation, haviqg [sic] lost all of his case as opposed to seven/eight's [sic] of his case, as with Mr. Biddison. So, if the Court of Appeals were to rule on that, perhaps, narrower ground, then we would have no instruction as to Biddison. So, it is just an effort, your Honor, to have the two class allegation issues before the Court. On the substantive issues I agree with your Honor because there are carbon copy complaints on those seven counts. But it's the class issue that is the only potential for a differentiation.

MR. KARAGANIS: Judge, having had various portions of my figurative anatomy shot off by the Seventh Circuit when I went up to argue the case on jurisdictional grounds – the Bieneman case is clean jurisdictional. There is a final judgment going to be entered by the Court. At the risk of complicating things –

THE COURT: I am going to decline your request for a 54(b) finding certification.

MR. CONWAY: All right. Very good, your Honor. Thank you.

MR. KARAGANIS: Thank you, your Honor.

MR. CONWAY: Shall we have another status date, your Honor, only so we can report back on the progress of our briefing?

THE COURT: Let's have a status in about 60 days.

MR. KARAGANIS: Thank you, Judge.

THE CLERK: August the 25th at 9:00 o'clock.

MR. CONWAY: Thank you, your Honor. That status, of course, will only be in Biddison.

THE COURT: Right. There is nothing left and I will have lost the jurisdiction in Bieneman.

MR. KARAGANIS: Hopefully, Judge. Thank you.

MR. CONWAY: Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.)

I CERTIFY THE FOREGOING TO BE THE CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ James W. Cheek

Official Court Reporter Date: 6-27-88

United States Court of Appeals

For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Date: February 26, 1988

Thomas F. Strubbe
Clerk
312-435-5850

Mr. H. Stuart Cunningham, Clerk
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Re: LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,
Plaintiff-Appellant,

vs.

THE CITY OF CHICAGO, et al.,
Defendants-Appellees.

U.S.C.A. - 7
No. 87-2077

District Court
No. 84 C 10388

Judge
Brian Barnett Duff

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P. 41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal. Please acknowledge receipt on the enclosed copy of this letter.

Contents of Record Being Returned Later:

Contents of Record being Returned:
3 Vols. Pleadings
Exhibits to item No. 25

/s/ MABEL L. BOBER
U.S.C.A. Deputy Clerk

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WINSTON & STRAWN
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Chicago, Illinois 60603

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

February 3, 1988

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,
Plaintiff-Appellant,

No. 87-2077 *vs.*

CITY OF CHICAGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 84 C 10388

The Honorable **Brian Barnett Duff**, Judge Presiding.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, DISMISSED for want of jurisdiction, with no costs in this Court, in accordance with the opinion of this Court filed this date.

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-2077

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 10388—Brian Barnett Duff, *Judge.*

ARGUED JANUARY 6, 1988—DECIDED FEBRUARY 3, 1988

Before POSNER, COFFEY, and EASTERBROOK, *Circuit Judges.*

PER CURIAM. Lawrence Bieneman filed this case on behalf of a class of other people similarly affected by noise from O'Hare Airport. Fed. R. Civ. P. 23(c)(1) requires a district court to decide "[a]s soon as practicable after the commencement of [the] action" whether it may be maintained on behalf of a class. Some three years went by, and the district judge was ready to rule on the merits. He dealt with the class aspect of the complaint this way, 662 F. Supp. 1297, 1298 n.1 (N.D. Ill. 1987):

> [N]o party [to this case or a companion suit] has sought a determination of whether it is appropriate to maintain these cases as class actions. It appears likely from the face of the complaints that class action status is appropriate, but the court declines to make such a determination without the participation of counsel. Presumably some party will raise the issue in the near future. Since the status of these cases as class actions is irrelevant to the motions before the court today, the court proceeds to address the merits of those motions.

The motions at hand were filed under Rule 12(b)(6), seeking dismissal for failure to state a claim on which relief may be granted. The court granted the motions, and the clerk inserted this language in the printed form used for final judgments:

> IT IS ORDERED AND ADJUDGED that Counts I, II, IV, V, VI, VII, and VIII are dismissed Count III is also dismissed.

Bieneman immediately filed a notice of appeal, which we must dismiss for want of jurisdiction.

An order dismissing a "complaint" as opposed to a "case" ordinarily is not a final judgment, *Benjamin v. United States*, 833 F.2d 669 (7th Cir. 1987), because the plaintiff may file an amended complaint. The theories on which the district court dismissed Bieneman's complaint preclude amendment, but the court's remarks show that it nonetheless believes there is more to do. It must decide whether to certify the case as a class action—no small matter, because this determines whether the judgment governs everyone who lives near O'Hare Airport or only Mr. Bieneman. A document identifying a defect in the complaint, without stating who is bound by the decision, is not a final judgment. *Glidden v. Chromalloy American Corp.*, 808 F.2d 621 (7th Cir. 1986).

Glidden is strikingly similar to our case. The district court in *Glidden* granted judgment for defendants while

reserving decision on the request to certify a class. The judge indicated that he would turn to this subject after the completion of the appeal on the merits. This reservation, we concluded, meant that the case was not over in the district court, making appeal impossible. The district court must complete its handling of the case before the judgment is "final" under 28 U.S.C. §1291. Here, as in *Glidden*, the district judge has flagged the class aspect of the case for future decision.

In a series of cases since *Glidden*, we have held that when the court overlooks the class allegation, a judgment dealing with the representative's claim alone is final because the district court has done everything it plans to do. *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1034 n.1 (7th Cir. 1987); *Clift v. United Auto Workers*, 818 F.2d 623, 626 (7th Cir. 1987); *Bennett v. Tucker*, 827 F.2d 63, 67 (7th Cir. 1987); *Lorance v. AT&T Technologies, Inc.*, 827 F.2d 163, 165 n.1 (7th Cir. 1987); *Hickey v. Duffy*, 827 F.2d 234, 238 (7th Cir. 1987). Bieneman's case has not ended, however, given the district judge's express identification of this issue as one needing resolution. Why none of the parties responded to the district court's invitation with a motion is beyond us—the district court even cited *Glidden* for the parties' edification—but none did, so the case is alive in the district court.

The district court's discussion might be read as saying that until some party makes a motion for class certification the court need not rule. On this view, failure to request certification amends the complaint to delete the claim on the class's behalf. We rejected a similar position in *Glidden*, however. 808 F.2d at 623-24. If a complaint includes a class allegation, the district court *must* address it, no matter what the parties later do. Otherwise the plaintiff could withdraw as representative unilaterally, or the parties could settle the case without the court's permission. Rule 23(e) forbids either course. If the complaint depicts the plaintiff as representative of a class, the district court must deal with the subject even if no one asks.

Rule 23(c)(1) says that that decision must come "as soon as practicable". Sometimes the class issues may be so intertwined with the merits (or the wisdom of a settlement) that they should be handled together. Cf. *Mars Steel Corp. v. Continental Illinois National Bank*, 834 F.2d 677, 680-82 (7th Cir. 1987). But the propriety of class certification does not depend on the outcome of the suit, see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-78 (1974), and one reason for early certification is to identify the stakes of the case so that the parties may choose their litigation strategies accordingly. After even a tentative decision on the merits, incentives are different. Indeed, a class representative who has lost on the merits may have a duty to the class to oppose certification, to avoid the preclusive effect of the judgment, while the defendants suddenly want the certification that they might have opposed at the outset. It is therefore difficult to imagine cases in which it is appropriate to defer class certification until after decision on the merits. See *Premier Electrical Construction Corp. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 363 (7th Cir. 1987); *Finberg v. Sullivan*, 634 F.2d 50, 64 (3d Cir. 1980) (en banc). Cf. *Watkins v. Blinzinger*, 789 F.2d 474, 475 n.3 (7th Cir. 1986). But cf. *Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987). Certainly this is not one. When the district judge (to whom this case was transferred some two years after its filing) recognized that there was an unresolved class allegation, he should have requested the views of the parties and postponed decision of the merits. Omission to do this does not dispose of the class allegation by default.

Glidden governs this case, and the appeal is dismissed for want of jurisdiction. After the district judge has dealt one way or the other with the class aspect of the complaint, any fresh appeal will be resubmitted to this panel. Counsel should advise the court promptly, after filing a new notice of appeal, whether they wish to use the original briefs or believe that supplemental submissions are necessary. If any party objects to the decision concern-

ing the class, the court will set a schedule for briefs addressing that issue. No costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BIENEMAN

v.

CITY OF CHICAGO

JUDGMENT IN A CIVIL CASE
DOCKETED JULY 23, 1987
CASE NUMBER: 84 C 10388

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Counts I, II, IV, V, VI, VII, and VIII are dismissed. Count III is also dismissed.

July 21, 1987
nunc pro tunc June 8, 1987
Date

H. STUART CUNNINGHAM
Clerk

CLAUDIA M. FLAG
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Minute Order Form

BIENEMAN

v.

CITY OF CHICAGO

Date: June 21, 1987
nunc pro tunc
June 8, 1987
CASE NUMBER: 84 C 10388
The Honorable
Brian Barnett Duff,
Judge Presiding.

DOCKET ENTRY:

Judgment is entered as follows:

Counts I, II, IV, V, VI, VII, and VIII are dismissed. Count III is also dismissed.

Mail AO 450 form.

Courtroom deputy's initials: CMF

Date received in central Clerk's Office: July 23, 1987

Date Docketed: July 23, 1987

Document # 111

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Minute Order Form

BIENEMAN

v.

CITY OF CHICAGO

BIDDISON

v.

CITY OF CHICAGO

CASE NUMBER: 84 C 10388

Date: June 8, 1987
The Honorable
Brian Barnett Duff,
Judge Presiding.

85 C 10295

DOCKET ENTRY:

Other docket entry:

Counts I, II, IV, V, VI, VII, and VIII of Bieneman v. City of Chicago, Case No. 84 C 10388, and Biddison v. City of Chicago, No. 85 C 10295, are dismissed. Count III of Bieneman also is dismissed. ENTER MEMORANDUM OPINION.

For further detail see order attached to the original minute order form.

Docketing to mail notices.

Courtroom deputy's initials: CMF

Date received in central Clerk's Office: June 9, 1987

Date Docketed: June 9, 1987

UNITED STATES DISTRICT COURT
NORTHRN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,

Plaintiffs,

v.

THE CITY OF CHICAGO, et al.,

Defendants.

No. 84 C 10388

DELBERT M. BIDDISON, on his own behalf and on behalf of all persons similarly situated,

Plaintiffs,

v.

THE CITY OF CHICAGO, et al.,

Defendants.

No. 85 C 10295

MEMORANDUM OPINION

Lawrence Bieneman and Delbert Biddison own homes near O'Hare International Airport and claim various injuries from the noise, vibrations, and air pollution that O'Hare inflicts on its neighbors. Each has sued the City of Chicago – which owns and operates O'Hare – and several airlines, seeking relief both on his own behalf and on behalf of "all persons who own, use or reside in residential real property situated in Illinois within the territorial boundaries of Cook County and DuPage County, under or adjacent to the paths of aircraft approaching, departing or

circling O'Hare International Airport." *Bieneman v. City of Chicago*, No. 84 C 10388; *Biddison v. City of Chicago*, No. 85 C 10295. The two cases have been found related, and come before the court today on defendants' motion to dismiss.[1]

Bieneman's and Biddison's eight-count First Amended Complaints are nearly identical, and name as defendants the City, Harold Washington in his official capacity as Mayor of the City of Chicago, Jerome Butler, in his official capacity as acting Commissioner of the Department of Aviation of the City of Chicago (collectively, "the City defendants"), and seven companies providing air passenger service at O'Hare: American Airlines, Inc.; Delta Airlines, Inc.; Northwest Airlines, Inc.; Ozark Airlines, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; and USAirlines, Inc. (collectively, "the airline defendants").

Count I of each First Amended Complaint accuses the City defendants of maintaining an official policy that has deprived plaintiffs of their Fourteenth Amendment rights to life, liberty, and property in violation of 42 U.S.C. Section 1983. Count II accuses the airline defendants of acting under color of state law as co-conspirators with the City to

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[1] Rule 23(c)(1) of the Federal Rules of Civil Procedure provides that "[a]s soon as practicable after the commencement of an action brought as class action, the court shall determine by order whether it is to be so maintained." Althoug the Seventh Circuit has emphasized the improtance of compliance whith this requirement, see, eg., *Glidden v. Chromalloy American Corp.*, 808 F.2d 621 (7th Cir. 1986), no party in either *Bieneman* or *Biddison* has sought a determination of whether it is appropriate to maintain these cases as class actions. It appears likely from the face of the complaints that class action status is appropriate, but the court declines to make such determination without the participation of counsel. Presumably some party will raise the issue in the near future. Since the staus of these cases as class actons is irrelevant to the morions before the court today, the court proceeds to address the merits of those motions.

deprive plaintiffs of their Fourteenth Amendment rights in violation of Section 1983. Count III is an inverse condemnation claim against the City.

Count IV alleges that the City's operation of O'Hare constitutes a continuing nuisance. Count V is a claim against the City for assault and battery. Count VI alleges that the airline defendants are joint venturers with the City in the operation of O'Hare and therefore are liable together with the City for the injuries alleged in Counts III-V. Count VII seeks a declaratory judgment that federal law does not preempt plaintiffs' state law tort claims against the City. Finally, Count VIII alleges that the City violated plaintiffs' Fourteenth Amendment rights by taking their property without due process.

The City defendants have moved to dismiss Counts I, III, IV, V, VII, and VII in *Bieneman*, and Counts I, IV, V, VII, and VIII in *Biddison*. In *Biddison* the City defendants have also filed a motion for summary judgment on Count III, but the court has suspended briefing on that motion pending additional discovery. The airline defendants have moved to dismiss Count VI in both *Bieneman* and *Biddison*. Because the parties have consolidated briefing in the *Bieneman* and *Biddison* cases, the court now has before it a single set of briefs addressing the merits of Counts I, III, IV, V, VII, and VIII of the First Amended Complaints, and a single set of briefs addressing the merits of Count VI of those complaints. The court examines each count in turn.

Counts I and II

Counts I and II of the First Amended Complaints restate claims that Judge Decker dismissed from Bieneman's original complaint on October 23, 1985. This court declined to reconsider Judge Decker's order and made it applicable to the *Biddison* case. Plaintiffs say they have repleaded Counts I and II in order to preserve their right to appeal Judge Decker's dismissal of those counts. *See London v. Coopers & Lybrand*, 644 F. 2d 811, 814 (9th Cir.

1981) (plaintiff waives all claims alleged in the original complaint which are not reasserted in the amended complaint); *contra Wilson v. First Houston Investment Corp.*, 566 F. 2d 1235, 1238 (5th Cir. 1978) (plaintiff who filed amended complaint after dismissal may raise on appeal the correctness of the dismissal order). It is not for this court to decide whether plaintiffs who file amended complaints must replead dismissed claims in order to preserve those claims for appeal; in this case plaintiffs have chose to replead the dismissed claims, and Judge Decker's ruling remains the law of the case. Counts I and II are dismissed.

Count III

Count III of Bieneman's complaint alleges that "in 1976 Defendant City of Chicago destroyed the use and enjoyment of Plaintiffs' properties, damaged and destroyed Plaintiffs' airspace, dwellings, and other structures on Plaintiffs' properties, and totally destroyed the value of Plaintiffs' property as residences." By virtue of this conduct, Bieneman continues, "Plaintiffs' properties and airspace, and each of them, have been confiscated, condemned, taken and made useless by Defendant City of Chicago without due process and without compensation in violation of the Fourteenth Amendment to the Constitution of the United States." The City moves to dismiss Count III on the ground that it fails to state a claim under the Fourteenth Amendment, and in any event is barred by the statute of limitations.

Unlike Bieneman's other federal claims – Counts I and II, which allege violations of Section 1983 – Count III alleges only a violation of the Fourteenth Amendment. There is strong authority that the Fourteenth Amendment does not support a direct cause of action against a municipality when the municipality is subject to suit under Section 1983.

The Supreme Court did imply a cause of action arising directly under the Constitution in *Bivens v. Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), where a Court held that victims of constitutional violations by federal agents may sue the agents despite the absence of a statutory cause of action. But the Court subsequently held that such a cause of action is not available when "Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (emphasis in original). Lower courts subsequently have expressed considerable reluctance to expand the number of direct actions allowed under the Constitution absent explicit Supreme Court approval, reading *Carlson* to limit the availability of such causes of action to circumstances where no alternative statutory remedy exists. *See, e.g., Morris v. Washington Metropolitan Area Transit Authority*, 702 F. 2d 1037, 1042 n. 10 (D.C. Cir. 1983).

Since the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), it has been clear that Section 1983 provides a cause of action against municipalities and municipal employees acting in their official capacities, and courts accordingly have declined to allow direct constitutional claims against local governments. As one court in this district has concluded, "Congress intended Section 1983 to be the exclusive federal remedy for the unconstitutional actions of city officials." *Strauss v. City of Chicago*, 614 F. 2d 9, 10 (N.D. Ill. 1984), *aff'd* 760 F. 2d 765 (7th Cir. 1985). *Accord Williams v. Bennett*, 689 F. 2d 1370, 1390 (11th Cir. 1982); *Ward v. Caulk*, 650 F. 2d 1144, 1147-48 (9th Cir. 1981). Indeed, the D.C. Circuit noted in Morris that since the Supreme Court's *Monell* decision every court of appeals to address the issue has concluded that no direct cause of action exists under the Fourteenth Amendment against nonfederal defendants. 702 F.2d at 1042 n. 10. In view of the

many decisions rejecting direct causes of action under the Constitution when statutory remedies are available, and in view of the fact that the Supreme Court has recognized a cause of action against a municipality under Section 1983 for inverse condemnation, *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 399-400 (1979), this court concludes that Bieneman does not have a direct cause of action against the City under the Fourteenth Amendment.

Only one recent case provides contrary authority, holding in a footnote that "[b]ecause an alleged 'taking' in violation of the fifth and fourteenth amendments presents a serious constitutional question, a direct cause of action lies within the district court's federal question jurisdiction." *Amen v. City of Dearborn*, 718 F. 2d 789, 792 n. 4 (6th Cir. 1983). But *Amen* cites as its only authority two pre-Monell cases, *Gordon v. City of Warren*, 579 F. 2d 386, 391 (6th Cir. 1978), and *Muskegon Theaters, Inc. v. City of Muskegon*, 507 F.2d 199, 200 (6th Cir. 1974), which allowed direct Fourteenth Amendment inverse condemnation actions against municipalities on the ground that no remedy was available under Section 1983. In light of *Monell* and *Lake Country Estates*, such reasoning is no longer valid.

Bieneman cannot save Count III by amending it to allege a violation of his rights under Section 1983. "[I]n Illinois, a plaintiff whose section 1983 cause of action accrued before the [Supreme Court's decision in *Wilson v. Garcia*, 105 S.Ct. 1938 (1985)], must file suit within the shorter period of either five years from the date his action accrued or two years after *Wilson*." *Anton v. Lehplamer*, 787 F. 2d 1141 (7th Cir. 1986). Because Bieneman's cause of action under Section 1983 arose in 1976, more than five years before he brought this suit, the statute of limitations bars his claim. Count III of Bieneman's complaint is dismissed.

Counts IV and V

The City raises two arguments against Counts IV and V, which allege the torts of nuisance and assault and battery: first, that federal law preempts state tort claims against airport proprietors; and second, that Illinois courts have not recognized a cause of action against the proprietor of a transportation facility for the lawful, non-negligent operation of that facility.

As the City points out, *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975) is a formidable obstacle to plaintiffs' tort claims. In Luedtke the Seventh Circuit held that federal law preempts state negligence and nuisance actions against airport proprietors and airlines so long as the airports and airlines are operating consistently with federal laws and regulations. 521 F. 2d at 391. *Accord, Bryski v. City of Chicago*, 148 Ill. App. 3d 556, 564 (2nd Dist. 1986).

Plaintiffs acknowledge *Luedtke*, but argue that it is no longer good law in light of the Supreme Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Silkwood holds that federal regulation of the safety aspects of nuclear energy does not preempt a state law action for punitive damages for the release of plutonium from a federally licensed facility. 464 U.S. at 258. The Court based its conclusion on extensive evidence that Congress intended to retain state tort remedies for nuclear injuries when it enacted laws regulating nuclear safety, and on its determination that the existence of state remedies would neither frustrate the objectives of federal law nor create an irreconcilable conflict between state and federal standards. *Id.* at 256.

Nothing in *Silkwood* suggests that the Seventh Circuit erred in *Luedtke* when it held that federal regulation of air transportation preempts state tort actions against airport proprietors and airlines complying with federal law. Neither *Luedtke* nor the Supreme Court decision on which

Luedtke relied, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (pervasive nature of scheme of federal regulation of aircraft noise preempts local ordinance limiting hours of takeoffs by jet aircraft), finds any evidence of Congressional intent to allow state regulation of airport operations. Indeed, *City of Burbank* recites substantial evidence that Congress did intend to preempt local regulation of airport noise. 411 U.S. at 633-39. *Silkwood's* conclusion that federal law does not preempt state tort actions in the area of nuclear safety does nothing to undermine Luedtke's conclusion that federal law preempts such claims in the unique and entirely unrelated field of air transportation.

Because *Luedtke* remains good law in the Seventh Circuit, this court must follow it. Counts IV and V are dismissed because they assert state tort claims preempted by federal law. It is unnecessary to address the City's alternative argument for the dismissal of Counts IV and V.

Count VI

Count VI alleges that the airline defendants are joint venturers with the City in the operation of O'Hare, and thus are liable together with the City for inverse condemnation alleged in Count III, and for the common law torts alleged in Counts IV and V.

As the court has already concluded, federal law preempts plaintiffs' state tort claims. *Luedtke v. County of Milwaukee*, 521 F. 2d at 391. *Luedtke and Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) foreclose plaintiffs' inverse condemnation claim against the airlines; both cases squarely hold that airlines may not be held liable for the taking of property adjacent to airports from which the airlines operate flights. Count VI is dismissed.

Count VII

In Count VII plaintiffs request a declaratory judgment that federal law does not preempt their state tort claims

against the City. Count VII is superfluous and an inappropriate invocation of the district court's power to grant declaratory relief. If plaintiffs' state tort claims survive a motion to dismiss there is no need for a declaration that federal law does not preempt them; on the other hand, if the court dismisses the state tort claims on the basis of preemption a request for a declaratory judgment of non-preemption can fare no better. Count VII is dismissed for the same reasons as Counts IV and V.

Count VIII

Count VIII alleges that the City violated plaintiffs' Fourteenth Amendment right to due process by acquiring interests in their property without notice or a hearing. This adds nothing to the allegations of Count III. Assuming plaintiffs can show that the City did actually "take" their property, it is settled law that a governmental body may take land without notice or a hearing, leaving the landowner with an action for inverse condemnation as his sole remedy. *United States v. Clarke*, 445 U.S. 253, 256-57 and n. 3 (1980); *Barbian v. Panagis*, 694 F. 2d 476, 482 n. 6 (7th Cir. 1982). Count III asserts such a claim, so Count VIII is redundant. Count VIII is dismissed.

CONCLUSION

Counts I, II, IV, V, VI, VII, and VIII of *Bieneman v. City of Chicago*, No. 84 C 10388, and *Biddison v. City of Chicago*, No. 85 C 10295, are dismissed. Count III of *Bieneman* also is dismissed.

ENTER:

/s/ BRIAN BARNETT DUFF

Brian Barnett Duff, *Judge*
UNITED STATES DISTRICT COURT

DATE: June 8, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated,

Plaintiff,

v.

THE CITY OF CHICAGO; HAROLD WASHINGTON, in his official capacity as Mayor of the City of Chicago; JEROME R. BUTLER, in his official capacity as acting Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and, USAIRLINES, INC.,

Defendants-Appellees.

No. 84 C 10388
Honorable Brian Duff

FIRST AMENDED COMPLAINT

PLAINTIFF DEMANDS TRIAL BY JURY

COUNT I

Defendants' Deprivation Of Rights Protected By The Constitution

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, by his attorneys, and complaining of Defendants CITY OF CHICAGO, HAROLD WASHINGTON, in his

official capacity as Mayor of the City of Chicago, and JEROME R. BUTLER, in his official capacity as acting Commissioner of the Department of Aviation of the City of Chicago, alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. Section 1331 and 28 U.S.C. Section 1343. The federal claims in this case arise under and are based upon the following constitutional provisions and laws of the United States:

a. The Fourteenth Amendment to the United States Constitution.

b. 42 U.S.C. Section 1983, which provides a claim for relief against any person acting under color of state law, individually, or in concert with others, to deprive plaintiffs of rights guaranteed by the Constitution and laws of the United States.

2. This Court's jurisdiction over the Plaintiff's state law claims is founded upon the doctrine of pendent jurisdiction. The state law claims arise out of the same common nucleus of operative facts as do the federal claims.

3. Venue is proper in this district under the provisions of 28 U.S.C. Sections 1391(b) and 1391(c). All of the causes of action arise in this district, and all of the Defendants do business in this district.

PARTIES

4. Plaintiff LAWRENCE C. BIENEMAN is a citizen, resident and owner of real property used for residential purposes located at 15 West Wood in the Village of Bensenville, DuPage County, Illinois. Mr. Bieneman purchased the aforesaid property in 1967.

5. Defendant CITY OF CHICAGO is a municipal corporation organized and existing under the laws of the State of Illinois and has its principal place of business in Cook County, Illinois.

6. Defendant HAROLD WASHINGTON is the duly elected Mayor of the City of Chicago.

7. Defendant JEROME R. BUTLER is the duly appointed acting Commissioner of the Department of Aviation of the City of Chicago.

8. Defendant AMERICAN AIRLINES, INC. is a corporation organized and existing under the laws of the State of Delaware, and is engaged, *inter alia*, in the business of carrying passengers for hire by airplane to and from O'Hare International Airport in Cook County and DuPage County, Illinois.

9. Defendant DELTA AIRLINES, INC. is a corporation organized and existing under the laws of the State of Delaware, and is engaged, *inter alia*, in the business of carrying passengers for hire by airplane to and from O'Hare International Airport in Cook County and DuPage County, Illinois.

10. Defendant NORTHWEST AIRLINES, INC. is a corporation organized and existing under the laws of the State of Minnesota, and is engaged, *inter alia*, in the business of carrying passengers for hire by airplane to and from O'Hare International Airport in Cook County and DuPage County, Illinois.

11. Defendant OZARK AIRLINES, INC. is a corporation or ganized and existing under the laws of the State of Delaware, and is engaged, *inter alia*, in the business of carrying passengers for hire by airplane to and from O'Hare International Airport in Cook County and DuPage County, Illinois.

12. Defendant TRANS WORLD AIRLINES, INC. is a corporation organized and existing under the laws of

the State of Delaware, and is engaged, *inter alia*, in the business of carying rying passengers for hire by airplane to and from O'Hare International Airport in Cook County and DuPage County, Illinois.

13. Defendant UNITED AIR LINES, INC. is a corporation organized and existing under the laws of the State of Delaware, and is engaged, *inter alia*, in the business of carryying passengers for hire by airplane to and from O'Hare International Airport in Cook County and DuPage County, Illinois.

14. Defendant USAIRLINES, INC. is a corporation organized and existing under the laws of the State of Delaware, and is engaged, *inter alia*, in the business of carrying passengers for hire by airplane to and from O'Hare International Airport in Cook County and DuPage County, Illinois.

CLASS ACTION ALLEGATIONS

15. Plaintiff LAWRENCE C. BIENEMAN brings this action on his own behalf and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

16. The plaintiff class consists of all persons who own, use and reside in residential real property situated in Illinois within the territorial boundaries of Cook County and DuPage County, under or adjacent to the paths of aircraft approaching, departing or circling O'Hare International Airport. (The individual plaintiff and the plaintiff class are referred to hereafter collectively as "Plaintiffs").

a. There are several hundred thousand members of the plaintiff class, thereby making joinder of all its members impossible.

b. There are questions of both law and fact common to the entire plaintiff class. Specifically, the legal bases of the complaint are identical as to each member of the class, and the unlawful conduct of

the Defendants was committed on grounds generally applicable to the class as a whole. In addition, common elements of relief are sought.

c. The claims of Plaintiff LAWRENCE C. BIENEMAN, as a representative party, are typical; and the legal bases of the claims are identical to the claims of the entire plaintiff class.

d. Plaintiff LAWRENCE C. BIENEMAN, will fairly and adequately represent and protect the interests of the plaintiff class.

17. This action is maintainable as a class action for each of the following reasons:

a. Prosecution of separate actions by individual members of the class would create a risk of inconsistent and varying adjudications with respect to the same conduct by Defendants, and would establish a risk of incompatible and inconsistent standards of conduct for the Defendants.

b. Prosecution of separate actions by individual members of the class would, if successful, be dispositive of the claims of the other members, because Defendants conduct would be declared unlawful, Defendants would be enjoined from violating the rights of class members and money damages would be recovered. If unsuccessful, prosecution of separate actions would substantially impair the ability of other members of the class to protect their interests.

c. Defendants have acted and refused to act on grounds generally applicable to the plaintiff class, thereby making appropriate final injunctive relief and corresponding relief with respect to the class as a whole.

d. The common questions of law and fact that exist

as to all members of the plaintiff class predominate over any questions solely affecting individual members of the class. A class action is superior to other available means for fair and efficient adjudication of this controversy.

DEFENDANTS' WRONGFUL CONDUCT

18. Defendant CITY OF CHICAGO owns, controls, operates and is proprietor of O'Hare International Airport, which is situated in both Cook County and DuPage County, Illinois.

19. It has been and continues to be the official policy and practice of Defendant City of Chicago to operate, manage, develop and expand O'Hare International Airport, under color of state law, in a manner that intentionally injures Plaintiffs and deprives them of their substantive constitutional rights to life, liberty and property that are guaranteed by the Fourteenth Amendment to the United States Constitution.

20. It has been and continues to be the official policy and practice of Defendant City of Chicago – duly authorized by Defendant Harold Washington, in his official capacity as Mayor, and duly implemented by Defendant Jerome R. Butler and his predecessor in office, Thomas Kapsalis, in their official capacity as Commissioner of the Department of Aviation – to operate, manage, develop and expand O'Hare International Airport as follows:

a. to put as many aircraft operations as possible through the airport with the full knowledge and intention that increases in aircraft operations increase the noise, vibrations, and air pollution impacting Plaintiffs and thereby injures Plaintiffs in their persons and property;

b. to fail to implement alternatives to increased aircraft operations that would not cause injury to

Plaintiffs in their persons and property;

c. to fail to implement mitigating measures that would reduce the injury to Plaintiffs in their persons and property resulting from noise, vibration and air pollution.

21. As a direct and proximate result of the official authorized policy and practices of Defendant City of Chicago, Plaintiffs have been intentionally pounded with excessive levels of noise and vibration, and have been inundated with air pollution by aircraft approaching, departing or circling O'Hare International Airport; and Plaintiffs have been injured and deprived of their substantive liberty and property interests protected by the Constitution in one or more of the following manners:

a. Plaintiffs have sustained physical injuries, including but not limited to headaches, nausea from noxious fumes and odors, other interferences with the senses, loss of sleep, fatigue, and pain and suffering;

b. Plaintiffs have sustained severe mental and emotional distress that has further damaged their physical health, including but not limited to stress, anxiety, nervousness, annoyance, strain, irritability, worry and fear for the safety of themselves and their family members;

c. Plaintiffs have sustained physical damage to the residential real property which they own, reside in and use, including but not limited to continued shaking and vibration of the structure, objects, and appliances and broken windows;

d. Plaintiffs have sustained damage from a substantial loss of the use and peaceful enjoyment of their property, including but not limited to interference with speech among family members and telephone communications, interference with radio,

stereo, and television communications and enjoyment, interference with the use of their yards and other out-of-doors portions of their homes, and difficulties in finding persons willing to purchase their homes;

e. Plaintiffs have sustained damages by reason of substantial interference with their ability to operate their businesses and pursue their livelihood, their ability to concentrate mental effort, their ability to study, their ability to perform ordinary tasks, their ability to pursue their recreational activities and pursuits, and their personal security and privacy; and

f. Plaintiffs have been exposed and are continuing to be exposed to a risk of cancer from the burned and unburned aircraft fumes.

22. The knowing and intentional infliction of the above-described injuries on Plaintiffs, as an official authorized policy of Defendant City of Chicago, violates Plaintiffs' substantive rights to life, liberty and property guaranteed by the Fourteenth Amendment to the United States Constitution. The deprivations and violations of Plaintiffs' constitutional rights and the damage to Plaintiffs by reason of the duly authorized official policy of Defendant City of Chicago is continuing and occurs on a daily basis.

23. In furtherance of its official policy, Defendant City of Chicago has, under color of state law, duly authorized and commenced implementation of a $1,500,000,000 expansion of O'Hare International Airport that will increase annual aircraft operations from 667,000 operations in 1983 to 920,000 or more operations in 1995, and to well in excess of 1,000,000 operations in the years thereafter. Defendant City of Chicago knows and intends that this substantial increase in operations will drastically increase the noise, vibrations, and air pollution impacting Plaintiffs, and will thereby exacerbate Plaintiffs' past and

current injuries and cause new and additional injuries and damage.

24. In furtherance of its official policy, Defendant City of Chicago has failed and refused to implement alternative plans that will not cause injury to Plaintiffs, and Defendant City of Chicago has failed and refused to implement mitigating measures that would reduce the potential injury to Plaintiffs from the expansion.

25. No municipality has the right to intentionally inflict physical injury on the person and property of individual citizens in furtherance of an official policy to maximize economic gains. Defendant City of Chicago, Harold Washington, in his official capacity as Mayor of the City of Chicago, and Jerome R. Butler, in his official capacity as acting Commissioner of the Department of Aviation of the City of Chicago, are liable to the Plaintiffs for compensatory damages under 42 U.S.C. Section 1983 for Defendants' past and current willful and intentional violations of Plaintiffs' substantive constitutional rights. Plaintiffs have no adequate remedy at law for the announced intention of, and steps already taken by Defendant City of Chicago and its duly authorized representatives to further violate Plaintiffs' substantive constitutional rights and cause further injury to Plaintiffs.

WHEREFORE, Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, prays that this Court grant the following relief in Plaintiffs' favor and against Defendants CITY OF CHICAGO, HAROLD WASHINGTON, in his official capacity as Mayor of the City of Chicago, and JEROME R. BUTLER, in his official capacity as acting Commissioner of the Department of Aviation of the City of Chicago:

A. judgment for compensatory damages against the Defendants in an amount in excess of $10,000 per Plaintiff for Defendants' past and current violations of Plaintiffs' constitutional rights;

B. a preliminary and permanent judgment enjoining and restraining Defendants from further violating Plaintiffs' constitutional rights;

C. a preliminary and permanent injunction requiring Defendants to implement alternatives to increased aircraft operations at O'Hare International Airport that would not cause injury to Plaintiffs in their person and property;

D. a preliminary and permanent injunction requiring Defendants to implement mitigating measures to reduce the continuing injury to Plaintiffs from noise, vibration and air pollution;

E. Plaintiffs' costs and reasonable attorneys' fees; and

F. such other relief as this Court deems just and proper.

COUNT II

Collusion Of The Airline Defendants With The City Of Chicago To Intentionally Injure Plaintiffs And Deprive Plaintiffs Of Their Constitutional Rights

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, by his attorneys, and complaining of Defendants AMERICAN AIRLINES, INC., DELTA AIRLINES, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC., (hereinafter collectively referred to as "Airline Defendants"), alleges as follows:

1-25. Plaintiffs adopt and reallege the allegations of paragraphs 1 to 24 inclusive of Count I as and for the allegations of paragraphs 1 to 24 of Count II.

26. The Airline Defendants planned, designed, imple-

mented and funded, in whole or in part, the past increases in aircraft operations at O'Hare International Airport in active concert and participation with Defendant City of Chicago, and in furtherance of Defendant City of Chicago's official policy.

27. In so doing, Airline Defendants knew and intended that the increased aircraft operations at O'Hare International Airport would increase the noise, vibrations and air pollution impacting Plaintiffs and thereby injure Plaintiffs in their person and property.

28. As a direct and proximate result of the conspiracy between and collusion of Airline Defendants and Defendant City of Chicago to intentionally deprive Plaintiffs of their substantive constitutional rights of life, liberty and property under color of state law, Plaintiffs, and each of them, have been injured in one or more of the following manners:

a. Plaintiffs have sustained physical injuries, including but not limited to headaches, nausea from noxious fumes and odors, other interferences with the senses, loss of sleep, fatigue, and pain and suffering;

b. Plaintiffs have sustained severe mental and emotional distress that has further damaged their physical health, including but not limited to stress, anxiety, nervousness, annoyance, strain, irritability, worry and fear for the safety of themselves and their family members;

c. Plaintiffs have sustained physical damage to the residential real property which they own, reside in and use, including but not limited to continued shaking and vibration of the structure, objects, and appliances and broken windows;

d. Plaintiffs have sustained damage from a substantial loss of the use and peaceful enjoyment of their

property, including but not limited to interference with speech among family members and telephone communications, interference with radio, stereo, and television communications and enjoyment, interference with the use of their yards and other outof-doors portions of their homes, and difficulties in finding persons willing to purchase their homes;

e. Plaintiffs have sustained damages by reason of substantial interference with their ability to operate their businesses and pursue their livelihood, their ability to concentrate mental effort, their ability to study, their ability to perform ordinary tasks, their ability to pursue their recreational activities and pursuits, and their personal security and privacy; and

f. Plaintiffs have been exposed and are continuing to be exposed to a risk of cancer from the burned and unburned aircraft fumes.

29. The knowing and intentional infliction of the above-described injuries on Plaintiffs, as a result of the conspiracy between and collusion of the Airline Defendants and Defendant City of Chicago, violates Plaintiffs' substantive rights to life, liberty and property guaranteed by the Fourteenth Amendment to the United States Constitution. The deprivations and violations of Plaintiffs' constitutional rights and the damage to Plaintiffs by reason of the Airline Defendants' conspiracy and collusion with Defendant City of Chicago is continuing and occurs on a daily basis.

30. In furtherance of this conspiracy, Airline Defendants are planning, designing, implementing and funding Defendant City of Chicago's $1,500,000,000 expansion of O'Hare International Airport that will increase annual aircraft operations from 667,000 operations in 1983 to 920,000 operations in 1995, and to well in excess of 1,000,000 operations in the years thereafter.

31. Defendant City of Chicago and the Airline Defendants have entered into a certain "Airport Use Agreement and Terminal Facilities Lease and Amendments Nos. 1 and 2" (hereinafter referred to as the "Use Agreement"). The form of the Use Agreement is too lengthy to attach hereto (more than 500 pages, including exhibits), but a true and correct copy is set forth in the Journal of Proceedings for the City Council of the City of Chicago, January 28, 1983, commencing at p. 15,665.

32. Pursuant to the Use Agreement, the Airline Defendants have guaranteed Defendant City of Chicago that the Airline Defendants will pay for the $1,500,000,000 expansion of O'Hare International Airport that will substantially increase annual aircraft operations.

33. Airline Defendants know and intend that the substantial increase in aircraft operations at O'Hare will drastically increase the noise, vibrations and air pollution impacting Plaintiffs and will thereby exacerbate Plaintiffs' past and current injuries and cause new and additional injuries and damages.

34. According to Thomas Kapsalis, former Commissioner of the Department of Aviation of the City of Chicago, Defendant City of Chicago failed to consider alternative plans that would not cause injury or damage to Plaintiffs, because the City's co-conspirators, the Airline Defendants, refused to fund less destructive alternatives than expansion of operations at O'Hare International Airport.

35. The Airline Defendants, having acted under color of state law as co-conspirators with Defendant City of Chicago, are liable to the Plaintiffs for compensatory and punitive damages under 42 U.S.C. Section 1983 for the Airline Defendants' past and current willful, malicious and intentional violations of Plaintiffs' substantive constitutional rights. Plaintiffs have no adequate remedy at law for the announced intention of and steps already taken by the Airline Defendants, in collusion with Defendant

City of Chicago, to willfully, maliciously, and intentionally further violate Plaintiffs' substantive constitutional rights and cause further injury to Plaintiffs.

WHEREFORE, Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, prays that this Court grant the following relief in his favor and against Defendants AMERICAN AIRLINES, INC., DELTA AIRLINES, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC.:

A. judgment for compensatory damages against the Defendants in an amount in excess of $10,000 per Plaintiff for Defendants' past and current violations of Plaintiffs' constitutional rights;

B. judgment for punitive damages against the Defendants in an amount sufficient to punish the Defendants for their past and current willful, malicious and intentional violations of Plaintiffs' constitutional rights, and to deter Defendants from committing similar wrongs in the future;

C. a preliminary and permanent judgment enjoining and restraining Defendants from further violating Plaintiffs' constitutional rights;

D. a preliminary and permanent injunction requiring Defendants to implement alternatives to increased aircraft operations at O'Hare International Airport that would not cause injury to Plaintiffs in their person and property;

E. a preliminary and permanent injunction requiring Defendants to implement mitigating measures to reduce the continuing injuries to Plaintiffs from noise, vibration and air pollution;

F. Plaintiffs' costs and reasonable attorneys' fees; and

G. such other relief as this Court deems just and proper.

COUNT III

Taking Of Plaintiffs' Property Under The Fifth And Fourteenth Amendments Of The United States Constitution

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, by his attorneys, and complaining of Defendant CITY OF CHICAGO, allege as follows:

1-18. Plaintiffs adopt and reallege the allegations of paragraphs 1 to 17 inclusive of Count I as and for the allegations of paragraphs 1 through 17 of Count III.

18. Defendant City of Chicago owns, controls, operates and is proprietor of O'Hare International Airport, which is situated in both Cook County and DuPage County, Illinois.

19. Plaintiffs own, use and reside in residential real property under or adjacent to the paths of aircraft approaching, departing or circling O'Hare International Airport.

20. Defendant City of Chicago has caused and continues to cause numerous jet-powered aircraft to be operated, piloted and propelled through the airspace over or adjacent to Plaintiffs' property, repeatedly and at all hours of every day and night.

21. These continuous operations of airplanes from the airport owned, operated, and controlled by Defendant City of Chicago, have impacted and continue to impact Plaintiffs and their property with excessive levels of noise and vibration, and inundate Plaintiffs with air pollution.

22. As a direct and proximate result of this continuous impacting and inundation, in 1976 Defendant City of Chicago destroyed the use and enjoyment of Plaintiffs'

properties, damaged and destroyed Plaintiffs' airspace, dwellings, and other structures on Plaintiffs' properties, and totally destroyed the value of Plaintiffs' property as residences.

23. By reason of the foregoing, Plaintiffs' properties and airspace, and each of them, have been confiscated, condemned, taken and made useless by Defendant City of Chicago without due process and without compensation in contravention of the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE, Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, prays that this court grant the following relief in his favor and against Defendant CITY OF CHICAGO:

A. a declaration that Plaintiffs' properties and airspace have been taken by Defendant CITY OF CHICAGO, without due process in contravention of the Fourteenth Amendment to the Constitution of the United States of America;

B. judgment for compensatory damages against Defendant CITY OF CHICAGO for each Plaintiff, for the value for the property and airspace taken by Defendant City of Chicago;

C. Plaintiffs' costs;

D. such other relief as this court deems just and proper.

COUNT IV

State Tort Law Claim For Continuing Nuisance

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, by his attorneys, and complaining of Defendant CITY OF CHICAGO, alleges as follows:

1-17. Plaintiffs adopt and reallege the allegations of paragraphs 1-17 inclusive of Count I as and for the allegations of paragraphs 1-17 of Count IV.

18. Defendant City of Chicago owns, controls, operates and is proprietor of O'Hare International Airport, which is situated in both Cook County and DuPage County, Illinois.

19. Plaintiffs, and each of them, own, use, and reside in residential real property under or adjacent to the paths of aircraft approaching, departing, or circling O'Hare International Airport.

20. Defendant City of Chicago has caused and continues to cause numerous jet-powered aircraft to be operated, piloted and propelled at low altitudes through the airspace over or adjacent to Plaintiffs' property, repeatedly and at all hours of every day and night.

21. These operations of airplanes to, from, and around the airport owned, operated, and controlled by Defendant City of Chicago, have impacted and continue to impact Plaintiffs and their property with excessive levels of noise and vibration, and inundate Plaintiffs with toxic air pollutants.

22. As a direct and proximate result of this pounding with noise, vibration and inundation by air pollution, Plaintiffs, and each of them, have sustained and continue to sustain one or more of the following injuries to their persons and/or property:

a. Plaintiffs have sustained physical injuries, including but not limited to headaches, nausea from noxious fumes and odors, other interferences with the senses, loss of sleep, fatigue, and pain and suffering;

b. Plaintiffs have sustained severe mental and emotional distress that has further damaged their physical health, including but not limited to stress,

anxiety, nervousness, annoyance, strain, irritability, worry and fear for the safety of themselves and their family members;

c. Plaintiffs have sustained physical damage to the residential real property which they own, reside in and use, including but not limited to continued shaking and vibration of the structure, objects and appliances and broken windows;

d. Plaintiffs have sustained damage from a substantial loss of the use and peaceful enjoyment of their property, including but not limited to interference with speech among family members and telephone communications, interference with radio, stereo, and television communications and enjoyment, interference with the use of their yards and other outof-doors portions of their homes, and difficulties in finding persons willing to purchase their homes;

e. Plaintiffs have sustained damages by reason of substantial interference with their ability to operate their businesses and pursue their livelihoods, their ability to concentrate mental effort, their ability to study, their ability to perform ordinary tasks, their ability to pursue their recreational activities and pursuits, and their personal security and privacy; and

f. Plaintiffs have been exposed and are continuing to be exposed to a risk of cancer from the burned and unburned aircraft fumes.

23. The foregoing actions of the Defendant City of Chicago constitute a continuing nuisance for which Plaintiffs are entitled to damages.

WHEREFORE, Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, prays that this court grant the following relief in

their favor and against Defendant CITY OF CHICAGO:

A. judgment for compensatory damages against Defendant City of Chicago in an amount in excess of $10,000 per Plaintiff;

B. Plaintiffs' costs;

C. such other relief as this Court deems just and proper.

COUNT V

State Tort Law Claim For Assault And Battery

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his behalf and on behalf of all persons similarly situated, and complaining of Defendant CITY OF CHICAGO, alleges as follows:

1-17. Plaintiffs adopt and reallege the allegations of paragraph 1 to 17 inclusive of Count I as and for the allegations of paragraph 1 through 17 of Count V.

18. Defendant City of Chicago owns, controls, operates and is proprietor of O'Hare International Airport, which is situated in both Cook County and DuPage County, Illinois.

19. Plaintiffs, and each of them, own, use, and reside in residential real property under or adjacent to the paths of aircraft approaching, departing, or circling O'Hare International Airport.

20. Defendant City of Chicago has caused and continues to cause numerous jet-powered aircraft to be operated, piloted and propelled at low altitudes through the airspace over or adjacent to Plaintiffs' property, and repeatedly at all hours of every day and night.

21. These operations of airplanes to, from, and around the airport owned, operated, and controlled by Defendant City of Chicago, have impacted and continue to

impact Plaintiffs and their property with excessive levels of noise and vibration, and inundate Plaintiffs with air pollution.

22. As a direct and proximate result of this continuous impacting with noise and vibration and inundation by air pollution, Plaintiffs, and each of them, have sustained one or more of the following injuries to their person:

a. Plaintiffs have sustained physical injuries, including but not limited to headaches, nausea from noxious fumes and odors, other interferences with the senses, loss of sleep, fatigue and pain and suffering;

b. Plaintiffs have sustained severe mental and emotional distress that has further damaged their physical health, including but not limited to stress, anxiety, nervousness, annoyance, strain, irritability, worry and fear for the safety of themselves and their family members;

c. Plaintiffs have sustained physical damage to the residential real property which they own, reside in and use, including but not limited to continued shaking and vibration of the structure, objects, and appliances and broken windows;

d. Plaintiffs have sustained damage from a substantial loss of the use and peaceful enjoyment of their property, including but not limited to interference with speech among family members and telephone communications, interference with radio, stereo, and television communications and enjoyment, interference with the use of their yards and other out-of-doors portions of their homes, and difficulties in finding persons willing to purchase their homes;

e. Plaintiffs have sustained damages by reason of substantial interference with their ability to oper-

ate their businesses and pursue their livelihood, their ability to concentrate mental effort, their ability to study, their ability to perform ordinary tasks, their ability to pursue their recreational activities and pursuits, and their personal security and privacy; and

f. Plaintiffs have been exposed and are continuing to be exposed to a risk of cancer from the burned and unburned aircraft fumes.

23. The foregoing intentional pounding and inundation of Plaintiffs by the Defendant City of Chicago constitutes a continuing assault and battery for which Plaintiffs are entitled to damages.

24. Recently, Defendant City of Chicago duly authorized and commenced implementation of a $1,500,000,000 expansion of O'Hare International Airport that will increase annual aircraft operations from 667,000 operations in 1983 to 920,000 or more operations in 1995. Defendant City of Chicago knows and intends that this substantial increase in operations will drastically increase the noise, vibrations, and air pollution now beating and inundating Plaintiffs, and will thereby exacerbate Plaintiffs' past and current injuries and cause new and additional injuries and damage.

25. This threat by Defendant City of Chicago to further intentionally physically injure Plaintiffs, coupled with the apparent physical ability of and steps already taken by Defendant City of Chicago to effectuate the threat, has created a well-founded fear of imminent peril in Plaintiffs. This conduct constitutes a further continuing assault by Defendant City of Chicago for which Plaintiffs are entitled to damages.

WHEREFORE, Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, prays that this court grant the following relief in

his favor and against Defendant City of Chicago:

A. judgment for compensatory damages against Defendant City of Chicago in an amount in excess of $10,000 per Plaintiff;

B. Plaintiffs' costs;

C. such other relief as this Court deems just and proper.

COUNT VI

Liability Of Airline Defendants As Joint Venturers

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similar situated, and complaining of Defendants AMERICAN AIRLINES, INC., DELTA AIRLINES, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC., (hereinafter collectively referred to as "Airline Defendants"), alleges as follows:

1-17. Plaintiffs adopt and reallege the allegations of paragraphs 1 to 17 inclusive of Count I as and for the allegations of paragraphs 1 to 17 of Count VI; and Plaintiffs further incorporate all of the remaining allegations of Counts III, IV and V inclusive, as allegations of this Count VI.

18. On or about January 28, 1983, Defendant City of Chicago and the Airline Defendants entered into certain Airport Use Agreements and Terminal Facilities Leases (hereinafter referred to as the "Use Agreements"). The form of the Use Agreement is too lengthy to attach hereto (more than 500 pages, including exhibits), but a true and correct copy is set forth in the Journal of Proceedings for the City Council of the City of Chicago, January 28, 1983, commencing at p. 15,665.

19. Under said Use Agreements, each Airline Defendant is granted the right to conduct an air transportation business at the airport, and to perform all operations and functions incidental, necessary or proper thereto. The City has agreed not to grant any airline in competition with any Airline Defendant any rights or privileges at the airport of a character or on a basis more favorable to such person than those granted or available to an Airline Defendant, the effect of which is to place an Airline Defendant at a competitive advantage. This grant includes the right to use, subject to certain restrictions, the airfield area, non-exclusive aircraft parking areas, airline's exclusive use premises, airline's aircraft parking area and the public use premises. Each of the Airline Defendants and the City have certain specified obligations with respect to the maintenance and operation of the airport.

20. The Use Agreements contain as exhibits thereto a list of those Capital Projects which are part of the Airport Development Plan approved by the Airline Defendants. Such exhibits also indicate with respect to each approved Capital Project its "Airline Funded Cost"and its "Priority" classification (see "1983 Use Agreements - Authorized Financing of Capital Projects") and certain other information.

21. The Use Agreements provide that the aggregate of all rentals, fees and charges to be paid by the Airline Defendants shall be sufficient to pay for the net cost of operating, maintaining and developing the airport (excluding the Land Support Area), including the satisfaction of all of the City's obligations to make deposits and payments under any ordinance or resolution authorizing airport obligations.

22. The Use Agreements further provide that the Airline Defendants shall indemnify and save the City harmless from and against any and all liabilities, losses, damages, judgments, awards, settlement costs and

expenses (including attorneys' fees and expenses) arising out of "*. . . suits alleging a taking of property or interests in property without just compensation, trespass, nuisance, or similar suits based upon the use of the airport* (other than the Land Support Area) *for the landing and take off of aircraft . . .*" (Use Agreements, Section 19.01(a)(i) (emphasis added).

23. The degree of effective control over the expansion, development and use of the airport exercised and retained by the Airline Defendants, as set forth in the Use Agreements, make said Airline Defendants joint venturers with Defendant City of Chicago in the development and use of the airport.

24. As joint venturers, the Airline Defendants are jointly and severally liable with Defendant City of Chicago for the damages sought herein in Counts III, IV, and V inclusive.

25. Inasmuch as the causes of action set forth in Counts III, IV, and V are based on intentional, willful, and malicious conduct of the Airline Defendants in concert and participation and collusion with Defendant City of Chicago, the Airline Defendants are further liable to Plaintiffs, and each of them, for punitive damages.

WHEREFORE, Plaintiffs LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similar situated prays that this Court grant the following relief in their favor and against Defendants AMERICAN AIRLINES, INC., DELTA AIRLINES, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC., and each of them:

A. judgment for compensatory damages against the Airline Defendants, jointly and severally, for all compensatory damages sought from Defendant City of Chicago in Counts III, IV, and V inclusive;

B. judgment for punitive damages against the Airline Defendants, jointly and severally, in an amount sufficient to punish Airline Defendants for their past and current intentional, willful an malicious conduct, and to deter Airline Defendants from committing similar wrongs in the future;

C. Plaintiffs' costs; and

D. such other relief as this Court deems just and proper.

COUNT VII

Declaratory Judgment That There Is No Federal Preemption Of Plaintiffs' State Law Actions For Damages

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, by his attorneys, and complaining of Defendant CITY OF CHICAGO, alleges as follows:

1. Plaintiff hereby incorporates and realleges the allegations of Counts IV and V which allege state tort law claims against Defendant City of Chicago.

2. As a matter of *federal* law the State Supreme Courts of California, Georgia and Wisconsin have held that Congress, in the passage of federal aviation legislation, did not choose to preempt state law tort actions *for damages* against airport proprietors. See *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 760 Cal.Rptr.733, 603 P.2d 1329 (1979), *cert. den.*, 499 U.S. 820 (1980); *City of Atlanta v. Owen*, 282 S.E.2d 906 (Sup.Ct.Ga. 1981); *Krueger v. Mitchell*, 112 Wis.2d 88, 332 N.W.2d 733 (1983); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, No. L.A. 31869, Slip. op. (Cal. September 23, 1985).

3. As a matter of the *same* federal law, the United

States Court of Appeals for the Seventh Circuit has held that Congress, in the passage of federal aviation legislation, did intend to preempt state law claims for damages. *Luedtke v. County of Milwaukee*, 521 F. 2d 387 (7th Cir. 1975).

4. It is irrational, arbitrary and discriminatory that, under the identical *federal* law of preemption, injured residents are allowed to invoke state law remedies in Los Angeles and Atlanta, but not in Chicago.

5. Plaintiffs contend that as a matter of *federal* law Congress, in the passage of federal aviation legislation, did not intend to preempt their state law claims against the City of Chicago for damages.

6. Defendant City of Chicago contends that as a matter of federal law Congress, in the passage of *federal* aviation legislation, did intend to preempt state law claims. Defendant City of Chicago justifies its injurious conduct and its refusal to compensate victims on the basis of the arbitrary and irrational discrimination between the application of the federal law of preemption as applied to Chicago, and the application of the *identical* federal law of preemption to Atlanta and Los Angeles.

7. By virtue of the foregoing, an actual controversy exists between the Plaintiffs and Defendant City of Chicago.

WHEREFORE, Plaintiffs LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similar situated prays that this Court grant the following relief in his favor and against Defendant CITY OF CHICAGO:

A. a declaration that as a matter of federal law Congress, in the passage of federal aviation legislation, did not preempt state law actions against airport proprietors.

B. such other relief as this Court deems appropriate.

COUNT VIII

Violation Of Procedural Due Process

NOW COMES Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, by his attorneys, and complaining of Defendant CITY OF CHICAGO, alleges as follows:

1-17. Plaintiffs adopt and reallege the allegations of paragraphs 1 to 17 inclusive of Count I as and for the allegations of paragraphs 1 to 17 of Count VIII.

18. Defendant City of Chicago owns, controls, operates and is proprietor of O'Hare International Airport, which is situated in both Cook County and DuPage County, Illinois.

19. Plaintiffs, and and each of them, own, use, and reside in residential real property under or adjacent to the paths of aircraft approaching, departing, or circling O'Hare International Airport.

20. On information and belief, Defendant City of Chicago, without notice or payment of compensation to Plaintiffs, claims to have taken for itself property rights in tens of thousands of parcels of residential real property owned, used and resided in by Plaintiffs. On information and belief, Defendant City of Chicago also claims that it need not pay any compensation for any of the property interests it claims to have taken.

21. Pursuant to the statutory provisions of the State of Illinois that govern O'Hare International Airport, Ill.Rev.Stat., ch. 24, Sections 11-102-1, *et seq.*, the City of Chicago cannot acquire a legal interest in Plaintiffs' property without first giving notice, holding a hearing and disclosing its plan.

22. Defendant City of Chicago has never given Plaintiffs any notice of Defendant's plan to acquire a legal interest in Plaintiffs' property.

23. Defendant City of Chicago has never held a hearing on Defendant's plan to acquire a legal interest in Plaintiffs' property.

24. Defendant City of Chicago has never publicly disclosed its plan to acquire a legal interest in Plaintiffs' property.

25. Defendant City of Chicago's failure to give notice, hold a hearing and publicly disclose its plan to acquire an interest in the tens of thousands of parcels of residential real property owned, used and resided in by Plaintiffs violates Plaintiffs' right to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiff LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similar situated prays that this Court grant the following relief in his favor and against Defendant CITY OF CHICAGO:

A. a declaration that Defendant City of Chicago has violated Plaintiffs' rights to procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution.

B. a declaration that any acquisition of any legal interest in Plaintiffs' real property claimed to have been made by the City of Chicago is null, void and of no force and effect by reason of Defendant City of Chicago's violation of Plaintiffs' procedural due process rights.

C. an injunction enjoining and restraining Defendant City of Chicago from acquiring any legal interest in any of the residential real property owned, used or resided in by Plaintiffs, unless and until Defendant City of Chicago gives all Plaintiffs notice, and holds a public hearing at which Defendant City of Chicago makes full disclosure of its plan.

D. such further relief as this Court deems appropriate.

PLAINTIFFS DEMAND TRIAL BY JURY.

LAWRENCE C. BIENEMAN, on his own behalf and on behalf of all persons similarly situated, Plaintiffs

By /s/ JOSEPH KARAGANIS

One of his attorneys

JOSEPH V. KARAGANIS
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 18, 1986, copies of Plaintiffs' **FIRST AMENDED COMPLAINT** in *Bieneman, et al. v. City of Chicago, et al.*, Case No. 84 C 10388, were served upon the following persons, by personal delivery:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Minute Order Form

BIENEMAN

v.

THE CITY OF CHICAGO

Date: March 19, 1986
No. 84 C 10388
Judge Duff

MOTION:

Plaintiff's motion to reconsider.

DOCKET ENTRY:

For further detail see order on the reverse of the original minute order form.

Docketing to mail notices.

Date received in central Clerk's Office: March 20, 1986

Docketed: March 20, 1986

Document # 60

(Reserved for use by the Court)

ORDER

Plaintiff's motion to reconsider Judge Decker's order of October 3, 1985, dismissing Counts I and II and ordering a more definite statement as to Count III, is denied. Because the legal and factual issues in this case are, by agreement of the parties, essentially identical to those in *Biddeson [sic] v. City of Chicago*, No. 85 C 10295, which has been consolidated with this case, Judge Decker's October 3, 1985 order shall apply equally in that case. Accordingly, the court strikes Counts I and II and orders a more definite statement of Count III in *Biddison v. City of Chicago*.

Plaintiffs in both cases are given until April 18, 1986 to amend their pleadings or file additional particulars. Defendants are given until May 19, 1986 to answer.

A status hearing is set for 9:30 am on June 3, 1986.

/s/ BRIAN BARNETT DUFF
Brian Barnett Duff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Minute Order Form

LAWRENCE C. BIENEMAN

v.

THE CITY OF CHICAGO et al

Date: 23 Oct 85
Case Number 84 C 10388
Judge Decker

DOCKET ENTRY:

Memorandum opinion and order.

Defendants' motions to dismiss Ct I and II of the complaint are granted. The City's motion to dismiss Ct III is denied. The Court grants the City's motion for a more definite statement.

Courtroom deputy's initials: MEU

Date received in central Clerk's Office: October 28, 1985

Date Docketed: October 28, 1985

Document # 29

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE C. BIENEMAN,
Plaintiff,

vs.

THE CITY OF CHICAGO, et al.,

Defendants.

No. 84 C 10388

MEMORANDUM OPINION AND ORDER

Plaintiff, Lawrence Bieneman (Bieneman), owns real property near O'Hare Airport (O'Hare). He claims the noise, vibration and pollution incident to the operation of O'Hare violate his constitutional rights. Therefore, he brought this class action 42 U.S.C. Section 1983 against the City of Chicago (the "City"), certain city officials, and various airlines (the "Airlines"). First, plaintiff alleges that, by its operation of O'Hare, the City intentionally deprived him of his Fourteenth Amendment rights (Count I). Next, plaintiff claims the Airlines conspired together and with the City to operate O'Hare in a manner violative of those rights (Count II). Finally, plaintiff alleges the City's operation of O'Hare constitutes a taking of his property without compensation in violation of the Fourteenth Amendment (Count III). Plaintiff seeks damages and injunctive relief.

The City moves to dismiss Count I for failure to state a claim.[1] It also seeks dismissal of Count III for failure to join a necessary and indispensable party under Fed. R. Civ. P. 12(b)(7) and 19(b), or in the alternative, for a more Adefinite statement of Count III. The Airlines move to

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[1] In considering a motion to dismiss, the court must "take [plaintiff's] allegations to be true, and view them, together with

(Footnote continued on the following page)

dismiss Count for lack of subject matter jurisdiction and failure to state a claim.

I. Discussion

1. Count I

Plaintiff complains that the City's operation of O'Hare results in a high volume of noise, vibration and air pollution harming residents of the surrounding community and their property. This may be, but plaintiff must identify a Fourteenth Amendment liberty or property interest violated by such activities to state a cause of action under Section 1983. *Jackson v. Byrne*, 738 F. 2d 1443, 1445-1446 (7th Cir. 1984).It is well settled that liberty and property interests arise from state law and the Due Process Clause itself. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

Plaintiff rightly admits there is no constitutional right to protection from general environmental harms. Plaintiff argues, however, that this case "should be treated . . . [as one] involving official policies that result in the intentional beating of citizens with fists and clubs." Plaintiff's Memorandum at 18. In essence, plaintiff alleges the noise, vibration and pollution at O'Hare constitute an assault and battery. Plaintiff, however, cites no case adopting his novel theory.[2] The court finds plaintiff's analogy between

---

1 *(Continued)*
reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff. *Powe v. City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). Dismissal for failure to state a claim is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

[2] Plaintiff contends that the factually similar case of *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972) *aff'd in part, rev'd in part on other grounds*, 541 F.2d 442 (4th Cir. 1976), recognized such a claim. The court disagrees. In *Virginians for Dulles*, the court characterized the plaintiffs' due process claim

(Footnote continued on the following page)

fists and clubs and airplane noise wholly inappropriate. Plaintiff's claim in better analogized to common law nuisance and the Seventh Circuit has expressly held that such tort rights "are not property rights under the Fourteenth Amendment." *Brown v. Brienen*, 722 F. 2d 360, 364 (7th Cir. 1983). Plaintiff's analogy also stretches the scope of the Fourteenth Amendment and Section 1983 beyond plausible limits. If noise from a lawfully operated airport is actionable under Section 1983, so too are other normal government operations, i.e., bus and train systems, construction projects. Neither the Fourteenth Amendment nor Section 1983 was intended to mandate such a result. Cf. *Jackson v. City of Joliet*, 715 F. 2d 1200, 1205 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1325 (1984). Because plaintiff does not sufficiently allege violation of his Fourteenth Amendment rights, Count I cannot survive.

2. Count II

Count II alleges a conspiracy among the Airlines and the City. Plaintiff's Fourteenth Amendment claim is based on the same faulty analogy rejected above.It is axiomatic that there can be no conspiracy to do that which is legal. Therefore, because plaintiff does not sufficiently allege violation of his Fourteenth Amendment rights, his conspiracy claim lacks an essential element and must be dismissed.[3]

---

2 *(Continued)*
as one based on nuisance. The court, in dicta, entertained the relevance of specific personal injury. Plaintiff interprets this to mean that a due process claim can be based on personal injury caused by airplane noise. The court's discussion, however, occurs in the context of its consideration of the nuisance claim and is relevant only thereto. The Fourth Circuit so interpreted the court's ruling on appeal. *Virginians for Dulles*, 541 F.2d 442, 443-444 (4th Cir. 1976).

[3] The court also notes that, even if properly pleaded, no such cause of action may be asserted against the Airline defendants.

(Footnote continued on the following page)

3. Count III

A. Motion to Dismiss

It is undisputed that plaintiff pleads a valid cause of action for the alleged taking of his property without compensation. *Griggs v. Allegheny County*, 369 U.S. 84, 88 (1962). The issue raised by defendant's motion is whether the United States must be joined as a party to this action. In *Griggs*, the Supreme Court held that the airport "promoter, owner and lessor" (the "proprietor") was liable for taking an air easement. Plaintiff argues that the City is the sole proprietor of O'Hare and the only necessary party to this action. The City contends, however, that by its independent control over certain land and operations at O'Hare, the United States is co-proprietor and as such must be joined in this action. Defendant's [sic] rightly point out that the court has no jurisdiction over the United States in this case because the United States can only be sued for inverse condemnation in the United States Claims Court where, as here, the claim exceeds ten thousand dollars. 28 U.S.C. Sections 1346(a), 1491. Therefore, if the United States is a necessary party, the court must determine whether this action should, in equity and good conscience, proceed without the United States. Fed. R. Civ. P. 19(b).

The court must decide whether the United States is a proprietor of O'Hare. Criteria relevant to this determination are ownership, operation, promotion and the ability to acquire necessary easements. *San Diego Unified Port District v. Gianturco*, 651 F. 2d 1306, 1317 (9th Cir. 1981), *cert. den.*, 455 U.S. 1000 (1982).

The United States originally selected the site and owned t' e land on which O'Hare is now situated. Through

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3 *(Continued)*

The Seventh Circuit so held in *Luedtke v. County of Milwaukee*, 521 F.2d 387, 389 (7th Cir. 1975).

a series of conveyances, it has transferred most of that land to the City. The United States retained a variety of controls over the land and operations at O'Hare as a condition of these conveyances. In particular, the City was obligated to, 1) use the land for airport purposes; 2) deny an exclusive right of use to any third party; 3) maintain the land and improvements in good condition; and 4) prevent the development of navigation hazards. In deeds executed in 1946 and 1972, the United States retained reversionary rights which vest if these conditions are not satisfied. *See* Exhibits "B-1," "B-7," and "B-8" to Defendant's Memorandum. Furthermore, the United States has title to a small portion of the land at O'Hare which it uses independently for maintenance and operation of its military aircraft.

Considering these and defendant's other arguments, the court is not convinced that the United States is a proprietor of O'Hare. The conditions set out in the deeds cited above implicitly assume that the City operates O'Hare. These conditions can be satisfied only by O'Hare's operator. The reversions constitute a remote interest in certain land at O'Hare, but do not evidence any active operation thereof.[4]

The United States' flights out of O'Hare constitute less than one percent of the airport's total flights. *See* Exhibit "4" to Plaintiff's Memorandum. Furthermore, the United States' independent operations at O'Hare are not at issue in this case. Plaintiff's complaint attacks only the City's operations at O'Hare. The City has no control over the United States' operations and therefore cannot be responsible for an easement created thereby.

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[4] The reversions may vest only upon violation of the aforementioned conditions. These conditions, however, are not implicated in this action. Therefore, there is little likelihood that the United States' interest in O'Hare will become more immediate and important as a result of this litigation.

The court is also mindful that in numerous documents, including O'Hare's operating license and a City ordinance authorizing revenue bonds for O'Hare construction, the City is listed as the sole operator of O'Hare. *See* Exhibits "2F," and "3" to Plaintiff's Memorandum. These and other documents indicate that the United States plays no active role in the proprietary operation of O'Hare. *See generally* Exhibits to Plaintiff's Memorandum. In sum, the court finds that the City is the sole proprietor of O'Hare and the only necessary party to this action. *Accord Illinois ex rel. Scott v. Butterfield*, 396 F. Supp. 632, 645 (N.D. Ill. 1975).

Alternatively, the court is convinced that even if the United States is a necessary party, equity and good conscience dictate that this action proceed without it. The factors considered by the court in this regard include, 1) the extent to which a judgment rendered in the absence of the United States might prejudice the United States or the City; 2) the extent to which that prejudice can be minimized by shaping the appropriate relief; 3) whether the relief so shaped is adequate; and 4) whether plaintiff has another available forum. Fed. R. Civ. P. 19(b).

Of greatest import is the lack of another available forum. Defendant admits that it cannot be joined by plaintiff as a matter of right in the United States Claims Court. Further, because the United States operates relatively few flights out of O'Hare, the court is confident that adequate relief can be fashioned in its absence and the practical likelihood of multiple proceedings is low. In addition, there is little possibility that proceeding will prejudice the City or the United States. Any such prejudice is outweighed by the aforementioned countervailing factors.

B. Motion for More Definite Statement

The court finds merit in defendant's motion for a more definite statement of the time at which the alleged taking occurred. Under plaintiff's theory of liability, at some point in time, the operations at O'Hare so burdened his

property as to constitute a partial taking thereof. For plaintiff to recover compensation from the City for this easement, he must show that he held title to the property at the time the easement was created. Therefore, plaintiff must allege in his complaint the time he took title to the property and the approximate time the easement was created. *See Branning v. United States*, 654 F. 2d 88, 102-103 (Ct. Cl. 1981).

II. Conclusion

For the foregoing reasons, defendants' motions to dismiss Counts I and II of the complaint are granted. The City's motion to dismiss Count III is denied. The court grants the City's motion for a more definite statement.

ENTER:

/s/ BERNARD M. DECKER
United States District Judge

DATED: October 23, 1985

No. 88-1497

Supreme Court, U.S.
FILED
APR 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

LAWRENCE C. BIENEMAN,

Petitioner,

v.

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago, HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and USAIRLINES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1. Where a municipality allegedly destroys the value of real property and the owner sues for just compensation, does *Wilson v. Garcia*, 471 U.S. 261 (1985), uniformly compel application of the state's personal injury statute of limitations governing actions under 42 U.S.C. § 1983 when the owner sues directly under the Fourteenth Amendment?

2. Alternatively, if *Wilson* is not applied and a federal court borrows the most analogous state limitations period, which of three possible Illinois statutes of limitations applies to an alleged taking without compensation of a person's real property by making noise and vibration near the property: (1) the personal injury statute (two years), (2) the statute for damage to real property (five years), or (3) the statute for recovery of lands taken by adverse possession (twenty years)?

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No. 88-1497

In The

Supreme Court of the United States

October Term, 1988

LAWRENCE C. BIENEMAN,

Petitioner,

v.

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago, HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago; AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC.; NORTHWEST AIRLINES, INC.; OZARK AIRLINES, INC.; TRANS WORLD AIRLINES, INC.; UNITED AIR LINES, INC.; and USAIRLINES, INC.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF IN OPPOSITION FOR CITY RESPONDENTS

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to the provisions cited by Petitioner Lawrence C. Bieneman ("Bieneman"), the following constitutional provisions and statutes are involved:

1. Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant

part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

2. The Illinois statute of limitations for, *inter alia*, injury to real property: "actions . . . to recover damages for an injury done to property, real or personal . . . shall be commenced within 5 years next after the cause of action accrued." Ill. Rev. Stat. ch. 110, § 13-205.

3. 49 U.S.C. § 1301(29): " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft."

4. 49 U.S.C. § 1304: "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. . . ."

5. 49 U.S.C. § 1508(a): "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. . . ."

6. 14 C.F.R. § 91.79(a)-(c): "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

> (a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) *Over other than congested areas.* An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

REASONS FOR DENYING THE WRIT

I. Summary of Argument

In this petition, Bieneman asks this Court to subvert the rule in *Wilson v. Garcia*, 471 U.S. 261 (1985), providing for a uniform limitations period for claims enforcing rights secured by the Fourteenth Amendment.[1] By arguing that direct constitutional actions should be controlled by different limitations periods than actions brought pursuant to 42 U.S.C. § 1983, Bieneman would reopen the fruitless search to borrow specific – and varying – limitations periods depending upon the characterization given the underlying constitutional claim asserted. This runs counter to this Court's recent reaffirmation that the federal courts should subject Fourteenth Amendment causes of action to a single statute of limitations in each State.

[1] Petitioner Bieneman has sought issuance of a writ of certiorari as to only one of the several issues resolved adversely to him by the court of appeals: the judgment that his claim for inverse condemnation (Count III) is barred by the applicable statute of limitations.

Bieneman has no support in the appellate courts for this approach. There is no conflict among the circuit courts of appeals here: three circuits have decided the issue directly, and all three are in agreement that the *Wilson* test applies to direct constitutional claims.

Even if Bieneman were to succeed in overturning *Wilson*, his claim – eight years old at the time of the complaint – would still be time-barred. The most closely analogous state statute of limitations to Bieneman's federal claim is Illinois' five-year limitations period for injury to real property.

II. Bieneman's Petition Ignores Settled Federal Law

A. Bieneman's Argument Is Foreclosed by the Recent Decisions of this Court

Bieneman argues that, in the case of actions brought directly under the Fourteenth Amendment to the United States Constitution,[2] the Court should investigate the particular cause of action and choose an analogous state statute of limitations. Bieneman is asking this Court to reconsider the holding and rationale of *Wilson v. Garcia*, 471 U.S. 261 (1985), as explained and reinforced in *Goodman v. Lukens Steel Company*, 482 U.S. 656 (1987), and again this year in *Owens v. Okure*, 109 S. Ct. 573 (1989).

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[2] Bieneman in his Petition declares in this Court that his action is brought "directly under the Fifth Amendment." Actually, to the extent that the case is brought directly under the Constitution, it would be under the Fourteenth Amendment, which applies to the States. *See* note 5, *infra*. Bieneman's Amended Complaint bears this out. (A-55 at ¶ 1; A-69 at ¶ 23).

In *Wilson*, the Court established a uniform method for borrowing statutes of limitations for actions brought pursuant to 42 U.S.C. § 1983, which creates a cause of action for violations of constitutional rights under color of state law.[3] In particular, the *Wilson* plaintiffs alleged violations of the Fourth, Fifth and Fourteenth Amendments. The Court recognized the wide variety of claims which could be brought under these constitutional provisions, and the resulting uncertainty in requiring a case by case search for an analogous state statute of limitations. 471 U.S. at 273-74. In light of the "federal interests in uniformity, certainty, and the minimization of unnecessary litigation," the Court held that one statute of limitations should apply to all § 1983 causes of action. *Id.* at 275. The Court found that to be the relevant state limitations period applicable to tort actions for personal injuries.

Bieneman's contention that *Wilson* has nothing to do with his Fourteenth Amendment case is disproved by the *Wilson* opinion itself. The Court emphasized that the statutory provision, § 1983, creates no substantive rights, but

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[3] Section 1983 reads as follows: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . ." 17 Stat. 13.

rather a remedy. *Id.* at 278. The substantive rights are created by the Fourteenth Amendment itself. The Court explicitly analyzed the language of the Fourteenth Amendment, and found it to be consistent with a uniform personal injury statute of limitations:

> The unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every *"person"* subject to the jurisdiction of any of the several States. The Constitution's command is that all *"persons"* shall be accorded the full privileges of citizenship; no *person* shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.

Id. at 277 (emphasis by the Court; footnote omitted). The clear holding of *Wilson* is that suits for violations of the Fourteenth Amendment are subject to the state personal injury limitations period.

Indeed, this Court has applied the *Wilson* holding to more situations than simply § 1983. In *Goodman v. Lukens Steel*, 482 U.S. 656, 107 S. Ct. 2617 (1987), the plaintiffs brought suit under 42 U.S.C. § 1981,[4] alleging racial discrimination against their right to make and enforce contracts. The Court held that § 1981, though it deals in part

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[4] Section 1981 reads as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

with contracts, specifically protects personal rights. 107 S. Ct. at 2621. The Court found that since § 1981 and § 1983 overlap to some degree, *Wilson*'s consistent limitations period would be "equally appropriate here." *Id.* Accordingly, the Court held that the state limitations period applying to personal injuries, not breaches of contract, was proper for § 1981. *Id.*

Most recently, the Court explained how to apply *Wilson* where the appropriate state has more than one statute of limitations for personal injury causes of action. In *Owens v. Okure*, 109 S. Ct. 573 (1989), the plaintiffs' alleged intentional beatings and misconduct by the police. The choice was between a statute of limitations applying to intentional torts, and one applying to general personal injuries not covered by specific statutes of limitations. The Court ruled that federal courts should not pick and choose among possible limitations periods based on the nature of the allegations; a single state limitations period – drawn from the state's personal injury tort statute of limitations – should control all § 1983 claims. 109 S. Ct. at 578-79.

In light of these three recent precedents, Bieneman may not validly argue that, while federal courts cannot choose a limitations period for violation of Fourteenth Amendment rights brought through § 1983 by examining the particular allegations to uncover an analogy, federal courts can and should regress to such a confusing analysis for alleged violations of the Fourteenth Amendment brought directly under the constitutional provision itself. Not only would such a rule require an abandonment of the *Wilson* rationale, but it would foster a new problem: actions for violations of the Fourteenth Amendment

would often have two different limitations periods, depending on whether the action was pled as a statutory § 1983 action or a direct constitutional action.[5] *Cf. McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958) (same statute of limitations should be applied to Jones Act claim and general maritime law claim in view of "practical necessity of combining both claims in a single action.")

Furthermore, application of the two year personal injury statute of limitations in this case would serve federal interests. As this Court stated in *Wilson*, "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws'." 471 U.S. at 271, *quoting Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805). Bieneman and numerous other suburban officials and residents have been fully aware of O'Hare's noise levels and aircraft operations for many years. *See Aircraft Noise Problems: Hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 87th Cong. (1962);

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[5] Indeed, Bieneman's Amended Complaint is less than crystal clear on this point. In the jurisdictional section of the Amended Complaint (A-55 at ¶ 1), explicitly incorporated by reference into Count III of the Amended Complaint alleging an inverse condemnation, Bieneman cites both the Fourteenth Amendment *and* § 1983. (A-55, 68). Bieneman could bring his inverse condemnation claim through 42 U.S.C. § 1983, *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 399-400 (1979), or directly under the Fourteenth Amendment, through which the Fifth Amendment is applicable to the States. *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 2383, 2386 n.9 (1987). Apparently, Bieneman now claims to do the latter. (Bieneman's Petition at 3, n.2).

Noise Pollution: Hearings on S. 1016, S. 3342 and H.R. 11021 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong. 2d Sess. (1972); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 187-88 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986);[6] *State of Illinois ex rel Scott v. Butterfield*, No. 74 C 2440 (N.D. Ill. 1974);[7] *Bauske v. City of Des Plaines*, 13 Ill. 2d 169, 148 N.E.2d 584 (1957).

Indeed, Bieneman purchased his home in 1967 (A-55 at ¶ 4) when O'Hare was already the busiest airport in the world. Application of the twenty-year adverse possession statute advocated by Bieneman instead of the two-year personal injury statute would require the City to defend against stale claims.

B. There Is No Conflict Among the Circuits

Bieneman fails to mention in his petition that, with its decision below, the Seventh Circuit joins two other federal circuits which have held that direct constitutional actions are governed by the state personal injury statute of limitations. *Chin v. Bowen*, 833 F.2d 21 (2nd Cir. 1987); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1107 (1988). No court of appeals has held to the contrary.

In both *McSurely* and *Chin*, the plaintiff brought an action against a federal agent for violations of the

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[6] Bieneman was a named plaintiff in *Suburban*, which challenged an FAA decree approving an airport layout plan for O'Hare. 787 F.2d at 187 n.1.

[7] Bieneman, as Mayor of the City of Bensenville, Illinois, signed the consent decree in 1982 which ended the *Butterfield* case. (A-5 n.1).

plaintiff's constitutional rights, so-called *Bivens*[8] actions. The district courts in each case dismissed the complaints based on *Wilson*. In both cases the plaintiffs argued on appeal that *Wilson* was grounded in statutory construction and the legislative history of the Civil Rights Act, and that direct constitutional actions should have a different rule. *McSurely*, 823 F.2d at 1004; *Chin*, 833 F.2d at 23. This is Bieneman's argument. (Bieneman's Petition at 15-16). Yet, both the Sixth and Second Circuits rejected this contention. The *McSurely* court reasoned that it was important to have uniformity between direct causes of action and § 1983 cases, especially since many cases involve both. 823 F.2d at 1005. The *Chin* court agreed, noting that *Bivens* actions and § 1983 actions are both designed to provide redress for constitutional violations. 833 F.2d at 24.

The Seventh Circuit's decision is in complete accord with these decisions. The Seventh Circuit held:

> When the defendant is a state actor, § 1983 and direct litigation may be interchangeable, the choice between them adventitious. There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy.

Bieneman, 864 F.2d 463, 469 (also reprinted at A-15).

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[8] *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The writ is unnecessary here to resolve any split among the circuits. The three courts of appeals which have faced this issue have properly followed this Court's decision in *Wilson* and unanimously rejected Bieneman's argument.

III. Bieneman's Invocation of the Twenty-Year Statute Is Erroneous

Bieneman's attempt to have this Court revisit *Wilson* is not only misguided; it would also be futile. Even if Bieneman prevailed on his argument to ignore *Wilson* and search for a state limitations period analogous to his particular case, a federal court would have to choose among three possible statutes of limitations: personal injury (2 years),[9] taking of property (20 years) and damage to property (5 years). Because Illinois' five year limitations period for damage to property is more closely analogous than the adverse possession statute, Bieneman's action would in any case be barred.[10]

To select the most analogous state statute of limitations, a federal court must first characterize the nature of Bieneman's action. Here, Bieneman has conspicuously not alleged that the City literally invaded and occupied his property in order to physically take it. Rather, he

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[9] Independent of its holding in *Wilson* that federal courts should be consistent in borrowing limitations periods, the Court found that the Fourteenth Amendment protects *personal* rights. 471 U.S. at 277. *See* discussion of *Wilson* at 6 *supra*.

[10] In light of its decision that *Wilson* applies here, the court of appeals below briefly discussed, but did not resolve, this argument. *See* A-13.

claims that the City damaged his property by alleging that the City "totally destroyed the value of Plaintiffs' property as residences" by aircraft operations. (Amended Complaint, Count III, ¶ 22; A-69). Bieneman's express allegations are best characterized as "an injury done to property, real or personal" (Ill. Rev. Stat., ch. 110, § 13-205) and not "an action for the recovery of lands." (Ill. Rev. Stat., ch. 110, § 13-101).

The Illinois Constitution of 1970 in Article I, Section 15 expressly provides two mutually exclusive categories of inverse condemnation – a taking of property and a damaging of property. A "taking" under Illinois law is limited to the case where an actual, physical invasion of real property by the government occurs. *Horn v. City of Chicago*, 403 Ill. 549, 87 N.E.2d 642 (1949), *cert. denied*, 338 U.S. 940 (1950); *Department of Transportation v. Rasmussen*, 108 Ill. App. 3d 615, 439 N.E.2d 48 (2d Dist. 1982). Merely conducting an activity adjacent to a landowner's property which damages the value of the property is not a "taking" under the Illinois Constitution, but rather is a "damaging."

Two Illinois Supreme Court cases illustrate the impact of this dichotomy on the applicable limitations period. In *Horn v. City of Chicago, supra*, property owners sued the City of Chicago for construction of a viaduct which allegedly interfered with and destroyed the property owners' access to light, air, ingress and egress to buildings adjoining the viaduct. The Supreme Court of Illinois first noted that no claim for a taking could be made in the absence of an actual physical invasion and occupation of the land. However, a constitutional claim

for a damaging could arise from the destruction or disturbance of easements of light, air, accessibility or other intangible rights. 403 Ill. at 554-55.[11]

Next, the supreme court turned to the question of the applicable statute of limitations to a damaging of property without just compensation. The court rejected the 20-year adverse possession statute asserted here by Bieneman as the controlling statute, and concluded that the five-year statute of limitations relating to actions to recover damages for injury done to real property was controlling. 403 Ill. at 561.

In *Chicago & Eastern Illinois Railroad Co. v. McAuley*, 121 Ill. 160, 11 N.E. 67 (1887), the Supreme Court of Illinois reached a similar result. The plaintiff contended that the nearby operation of a transportation facility – a railroad – through vibration, dust, smoke, cinders and other substances cast upon plaintiff's dwelling and premises, materially damaged his property and depreciated its value. The court concluded that the five-year statute of limitations governing actions to recover damages for injury done to property controlled. 121 Ill. at 168-69. It found that the statute was not affected by the continuing nature of the railroad's operations. 121 Ill. at 165-66. Because the railroad line was constructed more than five years prior to the commencement of the action, it found the entire claim barred by the statute of limitations. *See*

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[11] The current Illinois Constitution of 1970 reenacted the applicable provisions of the 1870 Constitution, in effect at the time of *Horn*, relating to constitutional takings and damagings. *See* Heiman and Whalen, *Constitutional Commentary*, Smith-Hurd Art. I, § 15, at 600-01 (1971).

also Kurtz v. County of Logan, 158 Ill. App. 3d 715, 511 N.E.2d 252, 254 (4th Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987) (five-year statute of limitations governing damage to real property applies to claim against county for flood damage arising from county's construction of a bridge and highway adjacent to plaintiff's property.)[12]

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[12] The Illinois' cases cited by Bieneman (Petition at 11) do not dictate a contrary result. Both *DiSanto v. City of Warrenville*, 59 Ill. App. 3d 931, 376 N.E.2d 288 (2d Dist. 1978), and *People ex rel. Markgraff v. Rosenfield*, 383 Ill. 468, 50 N.E.2d 479 (1943), involved allegations of physical invasion coupled with actual occupation and adverse use of property. The numerous cases cited by Bieneman from other jurisdictions do not advance his statute of limitations argument, either. First, the cases simply interpret the different limitations periods applicable in a wide variety of jurisdictions to various types of inverse condemnation actions. They do not constitute a statement of that "local time limitation" which this Court has contemplated would be borrowed when Congress has not established a time limitation for a federal cause of action. Illinois' particular limitations law distinguishing between constitutional "takings" and "damagings" of real property constitutes the applicable local limitations law.

Indeed, no monolithic rule of law mandates that the appropriate statute of limitations for inverse condemnation claims is always the statutory limitations period for actions to recover land under claims of adverse possession. Several state cases (not cited in Bieneman's Petition) have expressly rejected an adverse possession limitations statute for inverse condemnation claims. *See, e.g., Ranch 57 v. City of Yuma*, 152 Ariz. 218, 731 P.2d 113 (Ariz. Ct. App. 1986) (rejecting adverse possession statute and applying four-year "catch all" limitations statute to inverse condemnation claim); *Prendergast v. Park Authority*, 227 Va. 190, 313 S.E.2d 399 (1984) (applying three-year implied contract statute of limitations to inverse condemnation claim);

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The United States Constitution, under which Bieneman has brought this action, does not distinguish between what the Illinois Constitution characterizes separately as "damagings" of property for a public purpose and "takings" for a public purpose. Rather, what would be *both* "damagings" and "takings," as defined under the Illinois Constitution of 1970 (Art. I, § 15), are actionable against a municipality under the Fourteenth Amendment, incorporating the Fifth Amendment requirement of just compensation for "takings." *See United States v. Causby*, 328 U.S. 256, 260-61 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Tompkins v. Village of Tinley Park*, 566 F. Supp. 70, 75-76 n.5 (N.D. Ill. 1983) (comparing Illinois and federal rules). Here, Bieneman's alleged "taking" under the Fifth Amendment is actually most analogous to an Illinois "damaging" case for the purposes of choosing a limitations period.

Bieneman insists that his allegation of airflights "over" his property makes his claim more analogous to an actual taking supported by the required physical invasion, than a damaging through adjacent operations. (*See* Bieneman's Petition at 13 n.5). The problem with Bieneman's contention is that in the context of aircraft operations, a "taking" for the purposes of Illinois' statute of

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Don Roth Development Co., Inc. v. Missouri Highway and Transportation Commission, 668 S.W.2d 177 (Mo. Ct. App. 1984) (applying five-year limitations period, not adverse possession statute to inverse condemnation claim.)

limitations can only occur where aircraft pass directly through airspace legally owned by a landowner. Bieneman has not and cannot in good faith allege operation of aircraft through airspace legally owned by him.

The United States has "complete and exclusive national sovereignty in the airspace." 49 U.S.C. § 1508(a). There exists a "public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. § 1304. "Navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this Chapter, which shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301(29). The navigable airspace extends upwards in congested areas from 1,000 feet above the highest obstacle in the area and from 500 feet above the surface otherwise. 14 C.F.R. § 91.79 (1988). In light of these statutory provisions, it has long been recognized that a landowner's legal property interests only extend upward to the bottom of the federally created navigable airspace. Above that level is "public highway." *United States v. Causby*, 328 U.S. 256, 261 (1946); *cf. Florida v. Riley*, 109 S. Ct. 693, 696-97 (1989) (plurality opinion); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (acknowledging that helicopters and fixed-wing aircraft, respectively, were operating in the navigable airspace and therefore a defendant had no expectation of privacy for observations of his property made from the aircraft); *Perona v. Illini Harbor Services, Inc.*, 130 Ill. App. 3d 984, 986, 474 N.E.2d 1270 (3d Dist. 1985) (barge traffic on a navigable river is not trespass of plaintiff's riverbed property).

Operations of aircraft within the navigable airspace occur within the public domain and do not invade Bieneman's legally-owned property. So, while Bieneman may have a federal "taking" claim based on these allegations, *see Griggs v. Allegheny County*, 369 U.S. 84 (1962), Bieneman's claim is analogous to the landowner's claim in *Chicago & Eastern Illinois R.R.*, a "damaging" case as opposed to a taking case, for the purposes of the Illinois statute of limitations. As such, even if this Court were to abandon the uniform rule dictated by *Wilson*, the most analogous state limitation period would be the five year period applicable to damage to property. Under this statute, Bieneman's claim in Count III of the Amended Complaint is time barred. (A-68 at ¶ 22).

IV. CONCLUSION

For these reasons, Bieneman's petition should be denied.

Respectfully submitted,

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